16-586

SUPREME COURT U.S.
FILED
AUG 3 1882

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

BENJ. HAYDEN, *Appellant*,

vs.

CHARLES MANNING, *Appellee*.

No. 308.

Brief and Argument on part of Appellant.

A. H. GARLAND and JOHN H. MITCHELL,

Solicitors for Appellant.

WASHINGTON, D. C.:
NATIONAL REPUBLICAN PRINTING HOUSE,
1882.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

BENJAMIN HAYDEN, *Appellant*,
vs.
CHARLES MANNING, *Appellee*. } No. 308.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLANT.

The Court below erred in overruling the demurrer of the appellant to the bill of complaint. (Trans. print p. 8.)

And the court below erred in deciding that Hayden should make title to the land in controversy to Manning. (Trans. print. p. 22.) The decree should have been to dismiss the bill of complaint.

The hearing and decree upon the merits involve the question in the demurrer, and one argument will embrace the law on the demurrer as well as on the whole case.

The answer of Hayden to the complaint (Trans. print. p. 11) is clear, frank and positive, in no wise evasive or indirect. In all things material it meets the strictest requirements of the rules of pleadings, and as to matters within his knowledge denies the charges of the bill to the last. He places

himself in his answer entirely within the rule as laid down by the courts in this regard.

Marshall *vs.* Green, 24 Ark. 410–20.
Humes *vs.* Scruggs, 94 U. S., 24.
Bump on Fraudulent Conv., 542.
Kerr on Fraud, p. 383 and notes.

Such being the case, Manning is held to prove the merits of his claim by at least two witnesses, or one with strong corroborating circumstances, otherwise he must be defeated. Adams Eq. 21 and note. 1 (6th Am. Ed.) Kerr *sup.*

The judge in the court below (Tran. p. 27), admits "the evidence is conflicting concerning some of these conclusions of fact," conclusions he had already *reached* from the testimony.

We must remember too that the law in no case presumes fraud; the presumption is always in favor of innocence, and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud; fraud is not to be assumed on doubtful evidence, and *the facts constituting fraud must be clearly and conclusively established.* Kerr on Fraud, &c. p. 383–4. The facts here made up from the testimony of interested parties and from what the court below terms from time to time "*suspicious circumstances*," will not answer the requirements of the law, for in addition to the propositions advanced, the law insists still further, that "circumstances of mere suspicion will not warrant the conclusion of fraud."

Clarke *vs.* White, 12 Pet., 178.
Phettiplane *vs.* Sayles, 4 Mason, 312.
Taylor *vs.* Fleet, 4 Barb., 95.
White *vs.* Trotter, 4 Smed. and Marsh.
Gregg *vs.* Sayres, 8 Peters, 244.

To change the statement somewhat, we hold, if the case made out on the facts so far as Hayden is concerned, is consistent with fair dealing and honesty, the charge of fraud fails.

Hamilton *vs.* Kirwan, 2 J. and L., 401.
Pares *vs.* Pares, 33 L. J. Ch. 218.

An analysis of the evidence here, which will be given later, shows the conduct of H. to have been in good accord with honesty and fair dealing.

The stress laid by the court below upon the inadequacy of the consideration paid by H. (Trans. 31, 32) is too strained entirely. Inadequacy of consideration is not a ground to set aside a transaction if the parties were on equal terms and in a situation to judge for themselves: Kerr *sup.*, note 1. In this case Dove and wife had every opportunity of learning what H. had, and he used no means to prevent their learning. In law, he that has had an opportunity of knowing is held to have known. He is charged with knowledge.

The court must bear in mind, too, that this proceeding is to set aside transactions evidenced by deeds and other instruments of writing, by parol and extrinsic evidence. The authorities show that, in all such matters, the clearest and most convincing proof must be made; and this, outside of the question of fraud, heretofore considered. This pertains to all that kind of testimony that undertakes to reform a contract; to avoid a conveyance for mistake; to make a deed absolute on its face a mere mortgage or conditional sale. (Adams Eq.. 171, 172; Kerr *sup.*, 191, 192, 363, 364,417, 435.)

With the general principle of law announced by the court below, that an attorney cannot place himself in antagonism to his client, in reference to the subject-matter of litigation, and that the attorney can take no advantage in reference to the matter of contest, as against the client, we have no dispute. All that is admitted, but upon the facts of the case, Hayden does not come within this rule. By the proof, H. was no longer the attorney for D. and wife. His undertaking which was more that of a friendly act than of a retained paid attorney, had terminated, unless the court should hold

once the lawyer for a party always his lawyer. This principle does not apply after the relationship of client and attorney has ceased; Wendell *vs.* Van Renslaer, 1 Johns., Ch. 344; Gibson *vs.* Jeyes, 6 Ves. 277; nor indeed when the relation has been loosened, and does not subsist in full force. (Kerr *sup.*, 167, 169, 168, 170; Lewis *vs.* A. J., 4 Edw. Ch. 599.)

An attorney for the defendant may buy property sold under an execution; Divinney *vs.* Norris, 8 Watts, 314; Clearinger *vs.* Rieman, 3 W. and S., 486; and the mere fact that the attorney has obtained knowledge of the matters connected with the suit in the course of other business, does not prevent him acting adversely to his former client. (Price *vs.* Grand Rapids Co., 58 Ind., 137.)

But see how perfectly H. is protected by another proposition. The solicitor of a plaintiff out of whose hands the property is entirely taken by act of law, as upon a sale by execution, is not debarred from purchasing the property under execution, neither the defendant in the execution nor a third person can object to the validity of the transaction. Leach *vs.* Fowler, 22 Ark., 143; Howell *vs.* Baker, 4 Johns. Ch. 121; Hawley *vs.* Cramer, 4 Con., 717.

Another rule might be added thus. The possibility of a speculation or contingent advantage does not fall within those communications which a solicitor is bound to make to his client, if the transaction has been in other respects fair, and the point was as much open to the observation of the one party as the other. (Kerr *sup.*, 165.) Tested by this rule, Hayden is completely relieved in this transaction of all unfairness growing out of, or arising from, his trust as an attorner for Dove and wife at any time.

Take the principle as strongly as it can be found in the books: An attorney, therefore, purchasing or taking a benefit from his client, whilst the relationship of attorney and client exists, and in respect of that matter wherein it exists, must show that he took no advantage of his influence or knowledge, but gave his client all that reasonable advice

which it was his duty to have given him against a third party. (Adams *Sup.*, 379.) In the present case H. had ceased to be attorney; he had performed all he had undertaken to do; advised and worked to the full extent of his contract, and the property had gone into the hands of the law to be sold, with as full and complete knowledge of all the facts to Dove and wife as to himself. There was no fraud or unfair dealing in this, and in fact there could be none.

STATUTE OF FRAUDS.

Hayden, in his answer, insists that the contract as claimed by Manning between Dove and himself in relation to the sale of the land was verbal, and was never reduced to writing, and such is true; and being true, it fell within the statute of frauds. (7 Cranch, 176; Adams *Sup.*, 28, note 2; 5 Otto, 441.) Such a contract cannot be enforced if the answer denies any material particular in it. (Haight *vs.* Child, 34 Barb., N. Y., 186.) And as part of the rule heretofore stated, one witness is not sufficient to establish the parol contract. (William and Mary's College *vs.* Powell, 12th Gratt., Va. 372.)

Again, to take the case out of the statute, there must be much more shown than a mere contract and its violation—there must be *deceit* or *misrepresentation* constituting a *fraud.* (2 Perry's Leading Cases in Equity, 708.)

"But the weight of authority would seem to be, that to constitute fraud and suspend the operation of the statute," (Statute of Frauds, &c.) "there must be *deceit* or *misrepresentation* as distinguished from a *mere breach of promise, however wrongful*, and that those who choose to rely upon an oral assurance, in cases where the Legislature has required a writing, must trust to the honor of those with whom they deal, and cannot look to the law for indemnity for the breach of an engagement which it has solemnly deprived of all legal value." (Campbell *vs.* Campbell, 2 Jones Equity, 364; Miller *vs.* Collen, 5 Georgia; Sanborn *vs.* Wolson, 6 Harris

and Johnson, 252; Wilson *vs.* Watts, 9 Md., 461.

The case of Ryan *vs.* Day, 34 N. Y., 318, cited in the opinion of the court below, does not adversely affect Hayden in this case, when carefully examined in the light of qualifications more fully stated in other cases and properly applied.

In a carefully considered note to this case it is said:

"Where a mortgagee purchases at a foreclosure sale, to convert him into a trustee *ex-maleficio*, there must be something more than the violation of a parol agreement to re-sell the premises for the benefit of the mortgagor. (Wheeler *vs.* Reynolds, 66 N. Y., 227.) But whenever artifice or trick is resorted to to procure the property at an under value, as for example, by deterring bidders at a sheriff's sale, or in any other way, the rule is different." (Faust *vs.* Haas, 73 Penn. S. Rep., 301; Boynton *vs.* Housler, 73 Penn. S. Rep., 453; and see Levy *vs.* Brush, 45 N. Y., 596.)

SLEEPING ON HIS ALLEGED RIGHTS.

Supposing the proof as finally put in be clear to make out this trust, Manning must fail under a rule well established. The rule that a man who sleeps on his rights cannot come to a court of equity for relief holds good not only in circumstances where the length of time would render it extremely difficult to ascertain the true facts, but where the true facts are easily ascertained, or when it is clear that relief would have been given had there been no delay (Kerr *Sup.* 305). If, then, the case of Manning were stronger by many degrees than it is, he would be barred, not by force of any specific statute of limitations, but on the principles of estoppel—standing by seeing improvements made, and by silence and acquiescence therein—thus giving encouragement and sanction to the claim of the defendant.

This doctrine was fully discussed and recognized by this court in the case of Badger *vs.* Badger, 2 Wallace 95.

Mr. Justice Grier, in speaking for the Court, said:

"The numerous cases in the books as to dismissing a

chancery bill because of staleness, would seem to be contradictory, if the dicta of the chancellors are not modified by applying them to the peculiar facts of the case under consideration. Thus Lord Erskine, in a peculiar case once before him, says: 'No length of time can prevent the unkennelling of a fraud,' and Lord Northington, in Alden *vs.* Gregory, 2 Eden 285, with virtuous indignation against fraud exclaims: 'The next question is, in effect, whether delay will purge a fraud? Never, while I sit here. Every day adds to its injustice and multiplies its oppression.' In our own Court Mr. Justice Story has said (Prevost *vs.* Gratz, 6 Wheaton 481): 'It is certainly true that length of time is no bar to a trust clearly established, and in a case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be permitted to repel relief. On the other hand, the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to give ample and decisive relief.'

Now, these principles are no doubt correct, but the qualifications with which they are stated should be carefully noted:

1. The trust must be *clearly established*; and
2. The facts must have been *fraudulently* and *successfully concealed* by the trustee from the knowledge of the *cestui qui trust.*

The following abstract, quoted in the words used in various decisions, will suffice for the purpose of this decision:

Courts of Equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitations which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitation at law. But there is a defense *peculiar to courts of equity* founded on *lapse of time* and the *staleness of the claim* where no statute of limitation governs the case. In such cases courts of equity acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in presenting the claim, or long acquiescence in the assertion of adverse rights. *Long acquiescence and laches by parties out of possession* are productive of much hardship and injustice to others, and cannot be excused but by showing some *actual*

hindrance caused by the *fraud* or *concealment* of the parties in possession, which will appeal to the conscience of the chancellor."

The court proceeding further to speak of the requirements of a bill in chancery in such a case, said:

"The party who makes such appeal should set forth in his bill *specifically* what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights; and the means used by the respondent to *fraudulently keep him in ignorance.* And how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case *on his own showing*, without inquiring *whether there is a demurrer, or formal plea of the statute of limitations contained in the answer.*"

The court in this case, Badger *vs.* Badger, *sup.*, commenting further on this doctrine, said:

"The case of Michaud *vs.* Girod, (4 Howard, 503,) cited by appellant's counsel is an example of the class in which the *concealment of the fraud* was the aggravation of the offense. The facts of the case were 'clearly established' by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their *faith* and their *knowledge*, between things seen or heard by themselves, and that received from family or neighborhood gossip, or upon that most unsafe of all testimony, *conversations and confessions*, remembered or imagined, partially stated or wholly misrepresented. The *fraudulent concealment* was also '*clearly established.*'"

The court finally in making application of these principles to the facts of the case in Badger *vs.* Badger, said:

"The bill in this case is entirely defective in all these respects. It is true there is a general allegation that 'the fraudulent acts were unknown to the complainant till within *five years* past', while the statement of his case shows clearly

that he *must* have known, or *could* have known, if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in the bill."

The doctrines so clearly and forcibly stated in this case by the late Mr. Justice Grier, and their peculiar applicability as well as the reasoning in their support, to the case under consideration, will, it is hoped, be a sufficient excuse for the unusual and otherwise unpardonable length of the quotation made.

Again in the case of Marsh *vs.* Whitmore, 21 Wallace, 179, opinion by Mr. Justice Field, the doctrines enunciated in case Badger *vs.* Badger, *sup.*, were fully recognized and applied, the Court in its opinion quoting, at length and with approval from the opinion of the Court in the latter case

In this case of Marsh *vs.* Whitmore it was held that:

"Where an attorney sold bonds of his client at public sale, and bought them in himself, and the client was aware of the purchase and acquiesced in it for twelve years, it is then too late for the client to impeach the validity of the sale."

Testing the bill of complaint in this case by the principles enunciated in the cases just cited, it will be found at a glance to be wholly defective, and the court below erred in not sustaining the demurrer. (Tran. p. 7.)

Conceding that facts sufficient to constitute a fraud that will create a trust are averred in the bill, there is no pretense at stating that all these facts were not known to the Doves at the time it is alleged they occurred—no pretense that any of the alleged facts constituting the fraud was fraudulently or otherwise, succesfully or otherwise, concealed, or attempted to be concealed, from the *cestui qui trust* by the trustee. On the contrary, it is admitted substantially in the complaint that all the facts constituting the alleged fraud were known to the Doves as they occurred, or very shortly after. There is no attempt even "to set forth, specifically or otherwise, what were the impediments to an earlier prosecution of the claim," save the single statement, not in the form

of an averment as an excuse for not prosecuting the claim, but rather as a reason for the alleged transfer to the plaintiff, that "said Rachel, being very aged and feeble, and unable to prosecute her claim in the premises," etc. (Trans. page 3): or that either the Doves or Manning were at all for any time "*ignorant of their rights;*" or that there were "any means used *by the defendant to fraudulently keep them in ignorance.*" Not one of these material averments is contained in the bill, while on the contrary it appears from the bill itself that from March 5, 1864, the date of the sheriff's sale, until May 12, 1876, the date of the filing of the bill in this case, a period of over *twelve years* there was no attempt by any proceeding, at law or in equity, to test Hayden's right to these premises. According to this bill, all that was done by the Doves in all these years indicating any claim on their part, is indicated in the following rather loose and vague averment:

"That said Rachel has at divers times since defendant obtained the deed and acquired possession, demanded of him that he should restore to her said title and possession of said land so obtained as aforesaid, and that he account for the rents and profits thereof, and has offered to pay any differences that might be found in defendant's favor, but that defendant has refused, and still refuses so to do, and wholly denies said Rachel's title to said land, her rights and equities in the premises." (Transcript, page 3.)

True, the evidence in the case discloses what the bill does *not*, that on April 18, 1874, she, through her attorney, Mr. Lawson, presented a formal demand for the premises, and for an account, and that later, in September, 1874, she commenced a suit in the State Court which she voluntarily dismissed after issue joined in the spring of 1875; but even had these facts been stated in the bill, it would have been wholly insufficient, as this demand, and as it is the only one offered in evidence (Trans., page 112), it is fair to presume it is the *first* and *only one* ever made, was over *ten years* after the sale to Hayden, while the commencemeut of the suit in the

State Court was over *ten and one-half years* after. During all these years, therefore, the Doves stood silently by, seeing Hayden expend his money to the extent of over $1,700 in improving the place; saw him clear and break up for farming purposes about 160 acres, place 600 panels of post and plank fence, and a large amount of other fencing around the premises; rebuild the barn and repair the dwelling house, thus rendering the farm more than *treble in value* what it was when he purchased it. (Trans., 15, 83, 84, 88, 89, 93.)

The court below seems to have wholly ignored the principles enunciated in the cases of Baxter *vs.* Baxter, and Marsh *vs.* Whitmore *sup.*, in ~~his~~ opinion overruling the demurrer in this case (Trans., 24), as also in ~~his~~ final opinion in the case on its merits. (Trans., pages 22–36).

Before proceeding to review the evidence bearing upon the facts we beg to insert at this part for the convenience of the Court, the opinion of the Court below *in extenso*; and in doing this, in justice to the Court below, it is thought proper to give *tout bien ou rien.*

OPINION.

This suit is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to compel a conveyance of certain premises situate in Polk County containing 319 acres, and known as the south half of the Bethuel and Rachel Dove Donation, the same being parts of sections 2 and 3, in township 8 south, of range 4 west of the Wallamet meridian.

Substantially, the bill alleges, that the premises in controversy were the property of said Rachel, the wife of said Bethuel, the same being her half of the donation aforesaid, which was made by the United States to said Bethuel and Rachel in consideration of the occupation of the same by the former as a settler, under section 4 of the donation act of September 27, 1850, (9 stat., 497), from and after December 1, 1848; that on March 2, 1859, said Bethuel borrowed $1,550 from the county aforesaid to pay the balance of a debt then due one William Griswold, and upon the same date said Rachel and her husband executed a mortgage of the premises

to secure the payment of said loan; that at the date of the said mortgage the defendant was a practicing attorney, and was the attorney and confidential adviser of said Bethuel and Rachel in the matter of said loan and mortgage and otherwise; that the defendant, for the purpose of enabling himself to cheat and defraud said Rachel out of her donation, solicited her to execute said mortgage and assured her that he would mortgage his own home farm before she should thereby lose her property, and that by means of such solicitations and assurances she was induced to execute said mortgage; that on October 23, 1863, suit was brought to enforce the lien of said mortgage in which the defendant as the attorney of the mortgagors appeared and made a defence thereto, notwithstanding which, on November 18, 1863, a decree was given in said suit to the effect that said premises should be sold as upon execution to satisfy the sum then due upon said loan—$2,050.73 in currency—together with the costs of suit, and that thereupon said premises were advertised for sale; that prior to the date of such sale the defendant informed said Rachel that he would see that the property was bid off for her benefit and would protect her rights therein, and that in consequence of such information, and relying upon the honesty and integrity of said defendant, she did not attend such sale and took no steps to secure her interest in said property; that said premises at the sale thereof were worth $4,000 in gold coin, while the defendant bid in the same in his own name for the sum of $1,225 in currency, then not worth more than $612.50 in gold coin, and afterward stated and caused said Rachel to believe that said premises "had been bid off in her name and for her benefit and that the amount necessary for her to pay to redeem the same was the said sum of $612.50;" that relying upon such statements and the honesty of the defendant as aforesaid, said Rachel in July, 1864, paid defendant $200 in gold coin upon said bid, which he received with the understanding it should be so applied; that said Rachel and her husband continued in the possession of said premises as owners, and intending to redeem the same as aforesaid, until about August, 1865, when the defendant, intending and contriving to disseize the said Rachel, fraudulently procured her tenant, one O. H. Smith, to surrender the possession thereof to him, and has ever since retained the same and received the rents

and profits thereof to the value of $400 a year; that but for the promises and representations of the defendant as aforesaid said Rachel could and would have made other arrangements and secured the redemption of the property for her benefit; that the defendant afterward obtained a deed to said premises, as the purchaser thereof, from the sheriff making the sale, and claims to be the owner of the same in his own right, and refuses to convey the same to the said Rachel or account to her for the rents and profits thereof; that on April 7, 1865, said Rachel being aged and infirm and unable to prosecute her claim to the premises, for a valuable consideration conveyed the same and all her claim for rents and profits to the complainant, and that at the date of such conveyance the rents and profits then received by the defendant had more than paid the balance due him, and the premises were in equity the property of said Rachel and she was entitled to a conveyance of the same from the defendant.

The defendant demurred to the bill for divers causes, but upon the argument only insisted upon two: (1) that the alleged trust not being in writing is void; and, (2) that at the date of the conveyance aforesaid to the complainant, his grantors had no interest in the premises, and nothing to assign except a mere right of suit, which is not assignable.

The court, Deady, J., overruled the demurrer, saying: "Upon the facts stated in the bill I think that the plaintiff is entitled to the relief sought. After a careful consideration of the argument and authorities submitted for the defendant, my impression is that this is not a case of mere greement within the statute of frauds, but one of a fraud practiced by an agent or attorney upon his principal or client, whereby the former was enabled to acquire the legal title to the premises, to the prejudice and wrong of the latter. In such cases equity will redress the wrong by raising or implying a trust in favor of the injured party. The wrong-doer is held to be a trustee *ex maleficio*. (2 Lead. Cas. Eq. 708; Baker vs. Whiting, 3 Sum., 482; Ryan vs. Dox, 34 N. Y., 307.) If my impression is correct upon this point, then the demurrer is not well taken upon the second one. If, notwithstanding the deed from the sheriff to the defendant, he is only the trustee of the estate, Rachel Dove was the owner of the premises in equity and could convey the trust estate—the beneficial interest—to the complainant. (Baker vs. Whiting, supra.) And such a conveyance passes an interest in the property, and not a mere right of suit."

The defendant had leave to answer, the court saying, "It is to be understood that this opinion is expressed subject to correction on the final hearing, when the questions argued upon this demurrer may be considered in the light of the pleadings and proofs in the case."

The answer of the defendant admits that he was attorney for Bethuel Dove prior to the execution of the mortgage, but denies that he acted as such attorney in the matter of this loan and mortgage, or that he advised the same, or had any knowledge or information concerning the same until long after they were made. It denies that the defendant was employed by Bethuel and Rachel Dove to defend the suit to enforce the lien of the mortgage, but admits that he was so employed by Bethuel, and that to gain time for him he interposed a demurrer to the bill, which was overruled. It denies that the defendant informed or promised Rachel Dove that he would bid in the premises for her at the sheriff's sale, or that there was any understanding to that effect, but alleges that the Doves admitted their inability to hold the land, and asked him to buy for himself. It denies that the premises were worth $4,000 in gold coin, and alleges that they were not worth more than $1,225, without stating in what kind of money. It alleges that the sale of the premises was made on March 5, 1864, after being twice delayed for want of bidders, and that the sheriff's deed to the defendant was executed on April 26, 1864. It denies any information as to the value of currency at the date of the sale, but alleges that Bethuel and Rachel Dove thereby obtained a credit on their debt to the county of $1,177.50, that being the amount for which the property was sold, less the costs. It denies that the defendant ever gave Rachel Dove to understand that she could redeem the land by the payment of $612.50 in gold coin, or that she paid him $200 in pursuance thereof, but admits that in the summer of 1864, at the request of Bethuel Dove, he agreed with him that if he would repay the defendant the purchase money, with interest, within a year from the date of the sheriff's sale, he would sell said Dove the premises upon those terms, and thereupon said Dove paid him $200 in gold coin upon said bargain, it being then and there further agreed between the parties that in case the balance of said purchase money was not paid within the time specified that the said $200 was to be applied as rent money for the use of said land; that within the first year said Dove occupied the premises, under said agreement,

he cut and sold therefrom, $400 worth of timber, and because defendant remonstrated with him for so doing he left the place and rented the same to O. H. Smith, aforesaid, but retained the possession of 30 acres thereof, which he "cropped the second year" against the remonstrance of the defendant. denies that the defendant procured Smith to surrender the It possession of the premises to him, but alleges that he received such possession from Moses Clark, the subtenant of Smith, on October 31, 1865; and also that said Rachel ever demanded the possession of the premises from the defendant, or an account of the rents and profits thereof. It denies that said Rachel ever conveyed her interest in the premises to the complainant for "a valuable, or any, consideration," or that the complainant is, in good faith, the lawful owner thereof, or that since said sheriff's sale she was ever the owner in equity or otherwise of said land, or any part thereof.

It alleges that in 1864 the premises were worth $200 a year, but that since 1865 the defendant has expended $480 in clearing and breaking 150 acres thereof, $540 for post and plank fence, and $400 for other fencing thereon, and $300 for building a barn and repairing a dwelling thereon, since when the value of the premises has been $300 a y ar, and that he has paid taxes upon the property to the amount of $200; that the contract aforesaid for the sale of the premises to Bethuel Dove was not in writing, and therefore void, and that more than six years have elapsed since the expiration of said agreement.

A general replication was filed to the answer. The evidence of a number of witnesses, including that of the defendant and Bethuel and Rachel Dove, was taken before the examiner and read on the hearing.

Upon the evidence, including the answer of the defendant, the following facts are satisfactorily established: That on September 18, 1874, the register and receiver of the proper land office issued a certificate, under section 7 of the act of September 27, 1850, aforesaid, from which it appears that the premises in controversy are the wife's half of the donation of Bethuel and Rachel Dove, granted to them by section 4 of the act aforesaid, on account of the husband's set tlement and occupation thereon, commencing on December 1, 1868. That for some time prior to 1858, and up to 1865, the defendant was the general attorney and trusted adviser of Bethuel Dove and his wife; that in 1858 one William

Griswold, after serious litigation, obtained a judgment against Bethuel Dove for over $8,000, in which litigation the defendant acted as the attorney of said Dove, and as such procured one J. B. V. Butler, also a friend and client of his, to sign an undertaking for an appeal from the judgment of said district court to the supreme court of the Territory, by which undertaking the parties thereto became bound to pay said judgment if affirmed, whereas said Butler at the time of signing said undertaking understood from the defendant that it was for the costs of the appeal only; that said judgment was affirmed and all the property of said Dove liable to execution, consisting of the north half of said donation and other lands, were sold to satisfy the same, and that in March, 1859, there was still due upon said judgment the sum of about $4,000, for which said Butler was liable as a defendant therein, but which was afterwards paid by said Bethuel; that on March 2, 1859, said Bethuel and Rachel executed a mortgage upon the premises in controversy to the treasurer of Polk County, to secure the payment of the sum of $1,550 then borrowed by said Bethuel from the school fund of said county, and payable three years thereafter, with interest at one per centum per month, to apply upon said judgment and so far relieve said Butler from his liability thereon, and that the defendant advised said loan and mortgage and was instrumental procuring the former and inducing said Rachel to execute said mortgage, and received some $1,000 thereof from said Bethuel and Rachel to apply upon said judgment; that after said debt became due suit was commenced by the treasurer of said county in the Circuit Court thereof to recover the same and enforce the lien of said mortgage, to which suit said Bethuel and Rachel were parties defendant, and the defendant appeared therein as their attorney and made a defence thereto by demurrer, and on November 18, 1863, a decree was made therein that the plaintiff recover $2,052.75 and costs, and that the premises in controversy be sold as upon an execution at law to satisfy the same; that upon March 5, 1864, the said premises were so sold and bid in by the defendant for the sum of $1,125 in currency, the sale having been twice postponed in the mean time, "for want of bidders and other sufficient causes," which sale was confirmed by said court on April 26, 1864, and a deed of the premises executed by the sheriff to the defendant on the same day; that at the date of such sale the defendant was the attorney of said Bethuel and Rachel in said matter, and,

moreover, in making such purchase and receiving said conveyance was acting on behalf of said Doves in pursuance of an understanding between himself and them whereby the defendant was to bid in said premises at the sale in case they went low enough, as was expected, for the benefit of said Rachel, who was to redeem the same as soon as she could, in a reasonable time, and thereby secure a home for herself and husband in their poverty and old age, and that said Bethuel and Rachel relied upon said understanding, and therefore took no other steps or means to secure the property or redeem it within the time allowed by statute, as they might and would have otherwise done, and that on July 26, 1864, said Bethuel in pursuance of said understanding paid the defendant for said Rachel $200 in gold coin, for which he gave the following acknowledgement in writing:

"Received of B. Dove two hundred dollars to be applied on purchase of land purchased by me at sheriff's sale; the land known as Mrs. Dove half of donation land claim. July 26, 1864. (Signed) B. Hayden." But that the defendant afterward, by prohibiting said Bethuel from cutting and selling saw-logs from the premises and by procuring the tenant of the Doves—O. H. Smith, to whom the farm was rented in the fall of 1864, when Mr. Dove took up a homestead upon an island near by, where he has since lived—to pay him the rent due them, and finally in the fall of 1865 to surrender the premises to him, hindered and prevented said Bethuel and Rachel from obtaining and acquiring the money wherewith to complete said redemption as per the agreement and understanding aforesaid; that said Bethuel and Rachel are illiterate persons, not being able to read or write, and ever since the loss of the premises have been poor and without means to prosecute a suit for the same, while the defendant, by his position and influence in the county, has made it difficult, if not impossible, for them to assert their rights in the local tribunals with effect; that in September, 1874, said Rachel commenced a suit against the defendant in the Circuit Court of Polk County to recover the premises, but the same was afterward dismissed by her, and the premises, on April 7, 1875, as aforesaid, conveyed to the plaintiff, her son-in-law, for a valuable consideration, with the expectation and understanding that the plaintiff would bring a suit in this court to recover the premises, and such plaintiff thereby became and now is the owner of whatever right and interest therein the Doves then had; that at the date of the purchase

of the premises by the defendant, March 5, 1864, the currency or U. S. legal-tenders paid by him was only worth in gold coin 65 cents on the dollar, $796.25, and that the premises were then worth not less than $2,000 in gold coin, and probably $3,000, and are now worth, exclusive of improvements, not less than $10,000; that the defendant was allowed to purchase the property for a sum so far below its real value because he was well known in the community as the attorney and friend of the Doves, and was very naturally understood to be acting in their behalf; and that the sum due the defendant in coin, on account of this transaction, on January 1, 1879, is as follows: Paid on land March 5, 1864, $796.25; interest thereon at ten per centum for 14 years, 9 months and 25 days, $1,179.97; taxes paid on land, $200; present value of permanent improvements placed thereon, $1,000; total, $3,176.22; and that he is chargeable thereon as follows: Rent of premises from January 1, 1866, to January 1, 1879, 13 years, at $250 a year, $3,250; interest thereon, at rate aforesaid, $1,950; cash received July 26, 1864, $200; interest on the same, at the rate aforesaid, for 14 years and 5 months, $280.33; total, $5,680.33; balance against defendant, $2,504.11; from all of which it appears that the defendant has been long since repaid the money advanced to the Doves, and also his subsequent expenses in connection with his occupation of the premises.

The evidence is conflicting concerning some of these conclusions of fact, but the truth is generaly apparent, notwithstanding. I do not propose to discuss it in detail, but there are one or two points that justify some special attention.

As to the circumstances concerning the preparatoin and execution of the mortgage, there is a direct conflict between the testimony of the Doves and that of the defendant and his witness, Reason R. Boothby. The contradiction can hardly be explained upon the theory of a failure of memory or an unintentional mistake, and therefore it almost necessarily involves wilful falsehood.

At the date of the transaction the defendant was living on his donation claim a few miles north of the Doves, while Boothby lived at Eola, about half way between them.

The Doves swear unqualifiedly that Hayden came to their house and prepared the mortgage there, using Ford's notes of the claim survey which they had in describing the premises, and left it with them saying he would send Boothby, a justice of the peace, down to take their acknowledgment;

that Boothby came down the next day or two, when they executed and acknowledged the instrument.

On the contrary, Hayden swears both in his answer and testimony that he never wrote a line of the mortgage and don't know who did; that he never advised it or knew anything about it until some time after the execution. Boothby testifies that he wrote the mortgage, including, the names of the mortgagors thereto, Bethuel and Rachel Dove; in short that he wrote every word of the instrument, strument, except the names of the attesting witnesses, George Bolter and Theadore Ingalls.

The Doves, although not parties in interest, are not disinterested witnesses by any means, while the defendant is deeply interested in the result in both property and character. Boothby does not appear to be a person of any particular character or standing. During the past 20 years he appears to have lived from place to place in Oregon and Washington, for the most part east of the Cascades, and is a painter by trade.

A very satisfactory solution of this problem is furnished by an inspection and comparison of the writings on the mortgage with one another, and with that on the receipt of July 26, 1864; and also the signatures of the defendant and said Boothby to their evidence given before the examiner in this cause.

The mortgage bears upon its face indubitable evidence that Boothby's story is untrue; that he never wrote a word of the mortgage except the certificate of acknowledgment and his signature thereto as an attesting witness. In the first place Boothby's story and that of the defendant do not agree, for while the latter says he knew nothing about the making of the mortgage, the former said he went to Dove's to attend to this business at the request of the defendant, who then furnished him with a blank form upon which to write the mortgage and prepared a description of the premises.

The mortgage is upon a printed form of a deed of bargain and sale. The body of it contains 22 lines, which are written or mostly in writing, and the certificate 6 such lines, besides the signature of Boothby. The handwriting of the body of the instrument and the certificate are both unskilful, but quite uniform and marked in character and radically different. It is safe to say they were never written by the same person. The difference in the capital Rs, Bs, Ds, Ps, and figure 9s are very notable. But this is not all. In the body

of the instrument the name Rachel is incorrectly spelled with an æ in the last syllable, while in the certificate it is spelled in such syllable with an a only. Bethuel is spelled correctly in the body of the instrument, but in the certificate it is spelled without an *e* in the first syllable. It is also apparent that the name was first written in the certifiate as B-*h*uel, and then before completion corrected into B-*th*uel, by making the loop of an *h* upon the m stroke or lower part of the first *h*, and thus converting the latter into a *t*. But the loop of the second *h* did not come down directly upon the *m* stroke of the first one, but at an angle, on the outside, thus leaving the process of emendation quite apparent.

The signatures of Bethuel and Rachel Dove to the mortgage were evidently written by the subscribing witness, George Bolter, who wrote a plain, bold, round hand, as unlike that in the body of the instrument or the certificate as light and darkness.

Again, the words in the condition of the mortgage "according to the tenor and effect of a certain promisissory note," and the words "and fifty" in the premises of the deed immediately following the words "fifteen hundred," and the word "their" in the concluding clause are in a very different writing from the rest of the instrument. They are written in a skilled hand, with different ink, and upon comparison with the indorsement in red ink on the back of the instrument, showing when and where it was recorded, appear to be the writing of Mr. Lucian Heath, the then recorder of Polk County and Secretary of State elect.

The second and third of these insertions merely supply manifest omissions, while the first only formally expresses what would otherwise be implied from what was already expressed. Before this interlineation the condition read: "This conveyance is intended as a mortgage to secure the payment of the sum of *fifteen hundred and fifty* dollars," all but the words in italics being printed, and continued: Thus "the note executed by Bethuel Dove," &c., putting "the note" in apposition with "the sum of $1,560," which it represented. The interlineation, "according to the tenor," &c., was placed between the words "dollars" and "note" aforesaid, and the pen drawn through "the" before the word "note."

As it does not appear that Mr. Heath was present when the mortgage was executed, it is probable that these interlineations were made by him at the county seat, Dallas, when

the instrument was taken there by Dove, or other person, to obtain the money from the county treasurer, and was delivered to him for record.

Attention is called to these interlineations and insertions after the execution of the instrument, not to suggest that any wrong was committed or intended thereby, but to show the incorrectness of Boothby's testimony, who deliberately and repeatedly swore that he wrote every written word in the instrument except the signatures of Bolter and Ingalls, the subscribing witnesses.

Neither is this all. Boothby swears in effect that he took a clean blank with him to Doves on March 2, 1859, upon which he then and there wrote this mortgage, and it is very certain that this is not so. The mortgage reads, "This indenture, made this second day of March, A. D. 1859," the words "second" and "March" and the figure "9" being in writing. But upon examination it plainly appears that in place of these words there was first written "twenty-sixth" and "February," the latter words being partially erased and the former written over and in place of them. Neither were the words "second" and "March" written by Boothby, but probably Bolter, who appears to have been the best penman that made a mark upon the paper, unless it was Heath; while the words "twenty-sixth" and "February" appear to have been written by the person who wrote the body of the instrument. The coincidences are most convincing, but one is almost demonstrative. The letter "x" in "twenty-sixth" is formed by two perpendicular curved lines with their convex sides approaching and connected by a hyphen or horizontal line, thus)-(. According to my observation, it is a very singular formation of the letter, and an almost certain mark of identification. The only other written "x" in the instrument is found in the body of it, in the word "executed," and that is made in precisely the same way.

But the fact of the alteration of the date is a very significant one. It not only tends to prove that Boothby did not write the instrument as alleged, but also that it was drafted, as the Doves testify, by some one other than Boothby before the day of its execution, only the time was four days instead of one or two, as they remember it.

The instrument having been drafted on February 26th, when the parties came to execute and acknowledge it before Boothby on March 2d, it would naturally occur to some one that the date ought to be corrected, and so the words "twen-

ty-sixth" and "February" were changed to "second" and "March," but not so as to prevent the paper from revealing to the microscope, and even the naked eye, the truth of the transaction.

From these facts and the striking similarity between the writing in the body of the mortgage and that in the receipt of July 26th, which is admitted to be the defendant's, as well as his signature to the examination, it is mortally certain that the defendant wrote the mortgage, as the Doves testify.

The receipt is more than five years later in time than the mortgage, but making some allowance for the careless way in which the former is written, as compared with the later—it being necessary to write somewhat closely and small to get the matter in the spaces left in the blank—and for some freedom of hand acquired in the mean time, as well as the difference in pen, ink, and paper, the writings are very like. All the peculiarities of style—and they are many and marked—observable in the one are apparent in the other. The capital Rs, Bs, Ps, and Ds are very notable instances. The terminal ds are uniformly made with an upward and outward curl from the o instead of the stem, while the initial and middle ones are just as constantly made with a stem, which is well detached from the body of the o, the latter being open. The figure 8 in the two writings is very singular, and "they are as like as two black-eyed peas." The s, the ps, the words "Dove," "hundred," "land," "claim," in short the whole face and expression of the one is exhibited in the other.

In this connection it may be also mentioned that at the taking of the evidence before the examiner this receipt was mislaid and supposed to be lost, and counsel for the plaintiff put in a paper which he testified was a true copy. The defendant being examined afterwards in his own behalf, and while it was thought the original was lost, swore unqualifiedly that it did not contain the final words "the land known as Mrs. Dove half of donation land claim," and that it was for $200 "to be applied on land purchased by me at sheriff sale," omitting the words in italic, "to be applied on *purchase of* land purchased by me," &c. Subsequently the receipt was found, and produced and read on the hearing.

Next, as to the agreement or understanding between the defendant and the Doves concerning the purchase and redemption of the premises. All the circumstances, and particu-

larly the payment of the $200, and the receipt therefor, tend strongly to show that the defendant bid in the property at the sheriff's sale as the attorney and friend and for the benefit of the Doves, and that they were to remain in possession and have the benefit of the use and occupation of the place to enable them to repay him the purchase money with interest; and also that the defendant after a time conceived the design —lucri causa—to ignore his relation and understanding with the Doves, and claim the property as his own. The apparent excuse for this breach of faith was that these poor, old, unfortunate people would never be able to repay him, and to make sure of this he did what he could to prevent them from so doing by depriving them in the mean time of the use and possession of the property.

The defendant pretends that the agreement to redeem was made at the date of the receipt, and not before, and that he did not believe, at the time, that the Doves would be able to perform it, and therefore he made the further conditions that if the redemption was not completed within a year from the date, that is, by March 5th next following, the agreement should be at an end, and the $200 then paid on it be retained by him as rent of the premises for such year, But with this statement the known and undisputed facts of the case are at variance. The receipt itself is directly opposed to it. If such was the agreement, why does it not appear in this writing, and especially why does it not contain some reference to the alleged conditions that the redemption was to be made within eight months from that date; and, if not, that the $200 then paid should be retained by the defendant as rent. The defendant is an attorney, and a person of shrewdness and experience. These provisions are altogether in his favor, and it was his interest to preserve the evidence of them. While he was writing the memorandum a few words, more or less, would have expressed them. The Doves, according to his statement, had no rights in the premises, as against him, and so far as terms are concerned were at his mercy. But the language actually used in the writing is also contradictory of the defendant's statement. The receipt is not simply for $200 received by the defendant on account of land then sold the Doves, or then purchased back by them from him. On the contrary, it is in terms and effect for $200, to be applied on purchase of Mrs. Dove's land, theretofore purchased by the defendant at sheriff's sale. To be applied on what purchase? Why, manifestly, the purchase made at the sher-

iff's sale, thus suggesting distinctly what the Doves assert, that the land, though purchased at such sale by the defendant in his own name, was, in fact, purchased for them and was in equity and good conscience their purchase. Upon no other theory of the facts can effect be given to this word "purchase" in the receipt, or its use therein satisfactorily accounted for. Indeed, some such view of the matter must have suggested itself to the mind of the defendant, for he could not remember, when it was thought the receipt was lost, that it stated that the money was to be applied on the purchase of Mrs. Dove's land claim, and swore to the best of his recollection that these words were not in the receipt; and by way of giving emphasis and weight to his testimony in this respect, swore that he had seen the receipt and scrutinized it closely since this matter was placed in the hands of counsel.

As to the value of currency at the date of the sheriff's sale, I have consulted the contemporaneous quotations of the price of gold and find that legal-tenders were then worth, in Portland, 65 cents on the dollar, which makes the amount advanced by the defendant, in gold, $796.25. The only testimony upon this point was that of the defendant and Dove, the former stating that they were worth about 75 cents and the latter 50; but he also states, what he was more likely to remember, that the amount to be repaid the defendant was about $700 in coin.

As to the value of the property in 1864, the testimony is very conflicting, the opinions varying from $700 to $4,000 in coin. Much of it is unsatisfactory, and some of it utterly incredible, as for instance that it was not worth more than $2 per acre. In a country where land is the foundation of society, and agriculture the chief occupation of the people, a certain amount of knowledge upon this subject is common to most persons, and in considering this question it cannot be overlooked that this property is the half of a donation claim selected in 1848, and therefore probably choice land and favorably situated; that it lies very near the Wallamet River, within a few miles of the capital of the State; that with any kind of cultivation much of it will produce at least 20 bushels of wheat and 40 bushels of oats to an acre, one year with another, and that probably it has not since 1851 been held at a less value than $10 per acre, and under favorable circumstances might have been sold for that at most any time since. In arriving at this conclusion, weight

has been given to the fact that in 1859 the property was accepted by the county treasurer of Polk County as sufficient security for $1,550, in coin, payable within three years with 12 per centum interest. From this fact it must have been valued at about $3,000, and I have no doubt but that was what it was then generally considered worth. And this shows that the inadequacy of the consideration advanced by the defendant was very marked, it being at most a little over one-third its real value, an inadequacy "so gross and manifest as to shock the conscience."

It has been suggested that the price paid, $1,225 in currency, was credited on the decree against the Doves at par, and therefore the defendant ought to be considered as having advanced that much for them in coin or its equivalent.

So far as Rachel Dove is concerned, a sufficient answer to this suggestion is found in the fact that the decree against her, so far as it was in personam and for money, was void. She was not indebted to the county. She did not join with her husband in the note for the loan, and if she had, being a married woman, the act would have been a nullity. (Norton *vs.* Mader, 4 Sawyer, 620; Dick *vs.* Hamilton, 1 Deady. 338.) By the mortgage she pledged her property for her husband's debt, and by its sale on the decree it was discharged from the lien.

The parties seem to have acted upon the theory that the husband had no interest in the wife's land; but this was a mistake. Bethuel Dove was seized of an estate for his life in the donation of his wife by virtue of the marriage. (Star vs. Hamilton, 1 Deady, 372; Wythe vs. Smith, 4 Sawyer, 19.) But even as to the husband, if the defendant acted for him in making the purchase, the advantage, if any, accrued to the former and not to the latter. Between them the question is, not what effect did the payment of the currency have upon the decree, but what did it cost the defendant? What did he advance? (McDowell vs. Milroy, 69 Ill., 500.) Upon this state of facts, and leaving out of view for the present that the defendant was also the attorney of the Doves at the date of this transaction, the law implies a trust between the defendant and them. His conduct being inequitable and unjust, and involving a gross breach of the special trust and confidence reposed in him by the Doves to their serious injury and his corresponding advantage, equity will treat him as a trustee of the property thus wrongfully acquired, and hold him liable accordingly. (1 Perry on Trusts, secs. 166, 168,;

2 Sto. Eq., secs. 1254, 1261, 1265; 3 Lead. Cas. Eq., 139; Gaines vs. Chew, 2 How., 649.) This is a case of constructive trust—a trust arising out of the misconduct of the defendant, and does not depend upon the existence of a writing. It is without the statute of frauds, and the facts constituting it may be shown by parol. (1 Perry on Trusts, sec. 85; 2 Sto. Eq., sec. 1531; 2 Green Ev., sec. 266; Jenkins vs. Eldridge, 3 Sto., 286.) This being so, there is no doubt but that the Doves had an interest in the premises at the date of their conveyance to the plaintiff. In addition to the authority cited on the hearing of the demurrer upon this point, reference is made to Perry on Trusts, sec. 227, where it is said, "The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised. In the view of a court of equity he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee."

But it is contended for the defendant that this suit is barred by the lapse of time; that the plaintiff, or those under whom he claims, have been guilty of laches — have slept upon their rights.

In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it. As was said in this court in Hall vs. Russel, (4 Saw., 515,) "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trusts, where it is sought for the purpose of maintaining the remedy to force upon the defendant the character of a trustee, courts will apply the same limitation as provided for actions at law;" citing Elmendorf vs. Taylor, (10 Whea., 176;) Miller vs. McIntire, (6 Pet., 66;) Beaubien vs. Beaubien, (23 How., 207;) to which may be added Wisner vs. Barnett, (4 W. C. C., 638;) Kane vs. Bloodgood, (7 John. Ch. 110;) and Michond vs. Girod, (4 How., 560.) Apply this rule to this case, and this suit may be maintained at any time within 20 years from the fall of 1865, to the time when the defendant finally repudiated the arrangement with the Doves and wrongfully took possession of the premises, that being the period limited by statute for the commencement of an action at law therefor.

But where the trust is constructive and also arises out of the fraud of the defendant, there does not appear to be any fixed rule upon the subject. The matter is left to the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust when the demand is stale or where there has been long acquiescence in the wrong. (1 Perry on Trusts, section 228.)

Periods ranging from 50 to 17 years have been held to be a bar and under other circumstances a delay of from 11 to 18 years has been held to be no bar. (Perry, supra, sec. 229.) In Michond vs. Girod, (4 How. 561,) where the matter was thoroughly examined, Mr. Justice Wayne says:

"Within what time a constructive trust will be barred must depend upon the circumstances of the case. (Boone vs. Chiles, 10 Pet., 178.) There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within 30 years after it has been discovered or become known to the party whose rights are affected by it."

This suit was commenced within eleven years, and the one in Polk County within nine years from the time the defendant took possession of the premises and disavowed the understanding and obligation under which he acquired the legal title, so that in any view of the matter there is no ground on which to rest a claim that this suit is barred by lapse of time or that the demand is stale or the wrong long acquiesced in. Indeed, considering the circumstances of the case and the unequal condition of the parties, the court would not be justified in refusing relief upon the case made, if twenty years had elapsed from the commission of the wrong.

But the decision of this case can be put upon higher and safer ground than the contracts and understandings of the parties which are liable to both misrepresentation and misapprehension.

If the defendant was the attorney of the Doves at the time he bid in this property, he must be considered as acting for

them, and and he is liable to them therefor as their trustee, unless he can show satisfactorily that he purchased for himself with his clients' consent, and that the transaction was in every respect fair and not to their disadvantage. The presumption is against him and the burden of proof is upon him ; and if his interest as a purchaser may conflict with his duty as an attorney, the sale will be held void or the attorney charged as a trustee, at the option of the client. This rule is alike necessary to preserve the dignity and integrity of the legal profession and to protect the interests of a dependent and confiding clientage; and in the enforcement of it courts will not hesitate because the injury to the client does not fully appear or a positive intention on the part of the attorney to gain an advantage is not shown.

This statement of the law will be found fully supported by the following authorities, some of which go even beyond it and hold that a purchase by an attorney of the subject of litigation cannot be maintained against the client under any circumstances:

1 Perry on Trusts, sec. 166 ; Case vs. Carrol, 35 N. Y., 388; Harper vs. Perry, 28 Iowa, 60 ; 1 Sto. Eq., secs. 312–13 ; Berrien vs. McLane, 1 Hoff., ch. 423 ; Cuts vs. Salmon, 5 Eng. L. & E., 95 ; S. C., 12 Eng. L. & E., 317 ; Ward vs. Carter, 1 Eng. Eq. Cas., 26 ; De Row vs. Fay, 3 ed., ch. 389 ; S. C., 4 ed., ch. 44 ; Trotter vs. Smith, 59, Ill., 244 ; Howell vs. Baker, 4 John., ch. 128 ; Hess vs. Voss, 52 Ill., 481 ; Wade vs. Pettibone, 11 Ohio, 60 ; Nesbitt vs. Lockman, 34 N. Y., 169 ; McDowell vs. Milroy, 69 Ill., 500 ; Hawley vs. Cramen, 4 Cow., 730 ; 1 Lad, Cas. Eq., 203 ; Evans vs. Ellis, 5 Denio, 643 ; Weeks on Attorneys, sec. 273 et seq.

The already great length of this opinion precludes any citation from these authorities, but the following paragraph from Case vs. Carrol, supra. is so exactly in point and so sound in doctrine and clear in expression, that it may be cited notwithstanding :

"It is a settled principle of equity that no person who is placed in the situation of a trust or confidence in reference to the subject of the sale can be a purchaser of the property on his own account. And this principle is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but it is a rule of universal application to all persons coming within its principle, which is, that no party can be permitted to purchase an interest when he has duty to perform inconsistent with the character of a purchaser."

But it is contended that the defendant was not the attorney of the Doves at the time of the purchase. It is admitted however that he was the general attorney of the husband, and it is not seriously contended that he was not such attorney for the wife also, through the agency of the husband, so far as she needed one. It is also admitted that he was the husband's attorney in the foreclosure suit, and finally upon the hearing the quibble that he was not the wife's attorney also in such suit was frankly abandoned. And this accords with the record which states unequivocally that he appeared for both, though the demurrer filed by him, or the transcript of it, states that "the above named defendant"—in the singular—comes by B. Hayden etc. But who is "the above named defendant?" The reference is to the title of the cause in the beginning of the demurrer, and that reads, "J. Emmons, treas. of Polk County vs. Bethuel and Rachel Dove, defendants," so that if there is any ground for saying that this demurrer was made by the defendant for either of them rather than both, it is the wife, who is expressly named in full, and who was the principal party in interest. But this omission of the s from the defendant in the body of the demurrer is undoubtedly a mere clerical misprision and unworthy of serious contention or further consideration.

But it is claimed that the defendant ceased to be the attorney of the Doves from and after the date of decree of sale in the foreclosure suit, or at most at the expiration of 60 days thereafter — the time then allowed for an appeal to the Supreme Court.

This sale being made in a suit in equity, was a judicial one, and so in effect are all sales made upon execution in this State—that is, it was not made absolutely, but subject to the approval of the court, which might upon the objection of the defendant set it aside if it appeared that there were "substantial irregularities in the proceedings" concerning the same, to his probable loss or injury. (Or. Civ. Code, secs. 293, 413.) If, then, the relation between the defendant and the Doves, of attorney and client had not ceased before this sale, the defendant could not become a purchaser thereat on his own account without raising a conflict between his duty and his interest. It was his duty to examine the circumstances of this sale, and if he found good cause to object to its confirmation. The property was sold for not more than one-third its value. There is satisfactory testimony in the case that a neighbor intended to make the property bring at

least the amount of the decree and costs, but learning that the defendant was going to bid for Mrs. Dove, and having sympathy for her, he generously forebore. But this was an irregularity which ought to have avoided the sale. The loss was a direct injury to Dove, who was left personally liable for so much of the decree as the sale of property ought to have satisfied but did not. But the defendant, as he was situated, could not or would not bring this matter before the court, because if he purchased for Dove, as was the understanding, his clients were satisfied, while if he purchased for himself, as he now claims, his interest would prevent it.

How or why the defendant ceased to be the attorney of the Doves before this sale is not shown, nor can it be. It is not claimed that there was any change of attorney or any agreement or understanding that his services were to stop short of the final determination of the matter, which was not the mere entry of the order of sale, but the final confirmation.

By the law of this State an attorney has authority to bind his client in any of the proceedings in a suit by an agreement. (Civ. Code, sec. 1007.) And he may be changed before the final determination thereof by consent, of record, or the order of the court. (Id., sec. 1010.)

As has been shown, the final determination of the proceeding in question was the order confirming the sale. It is not pretended that there was any change of attorney between the order and confirmation of sale, as provided by statute or anywise.

Still it is insisted that in some undefined and occult way the defendant dropped out of the case before the sale, and was thereafter a stranger to the proceeding. Suppose the defendant had not purchased and had signed a stipulation consenting to a resale or had appeared in court and objected to the sale, would it have been necessary to enter his appearance anew as upon a first retainer, or would the court or opposing counsel have presumed or thought of asking for his authority to appear in the proceeding for the confirmation of the sale, in the suit in which he had appeared and acted as the defendant's attorney in the preparation and hearing of the cause?

It seems to me that the matter is too plain for argument. The defendant was the attorney of the Doves when he made the purchase, and in so doing, if he purchased for himself, as he now claims, he put his duty to them in conflict with his

interest as such purchaser, to the manifest injury of his clients, and therefore they have a right to treat the sale as void, or to hold him to account as their trustee. If, on the other hand, he purchased it for them, as I find from the evidence he did, then of course he is their agent and trustee, and bound to account to them as such.

The conclusions he here stated have not been lightly or hastily reached. But they are the result of a thorough examination of the case, and a full and careful consideration of the questions involved in it, after able and instructive arguments by the learned counsel who appeared for the parties —particularly for the defendant. I now announce them with reasonable confidence in their conformity to the law and justice of the case, and with the comfortable assurance that if they are otherwise the defendant can appeal to so exalted a tribunal as the Supreme Court of the United States for their correction.

The decree of the court will be, that the defendant, within sixty days, convey the premises to the plaintiff by a good and sufficient deed with proper covenants against his own acts, to be prepared and settled before the master of this court, and at the same time deliver possession of the premises, and that defendant within the same time pay the plaintiff his costs in this suit expended, and that in default thereof execution issue therefor.

George W. Lawson, H. Y. Thompson and Claude Thayer, for the plaintiffs.

E. C. Bronnaugh and William H. Effinger, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

ANALYSIS OF THE TESTIMONY.

We come now to consider the evidence and apply the principles of law suggested. The Court below found against the plaintiff in error on *two* material issues of fact:

1. That there was *an agreement prior to the sale of the premises in question* upon the part of Hayden with the Doves that he would purchase the same at the sheriff's sale in his name for their use and benefit; and

2. That he, Hayden, was, at the date of such purchase, *the attorney of Mrs. Dove* in the proceedings in court relating to the sale of the property, and therefore, in the absence of any agreement became, by his purchase, her trustee, etc.

It is confidently submitted that in view of the several well-established rules of equity proceedings heretofore suggested as applicable to cases of this character, and of the testimony in this case taken as a whole, the Court below erred in respect to *both* these findings of fact.

It is a somewhat remarkable fact, and one that will not escape the notice of the Court, that the learned District Judge, sitting in this case as a circuit court, in giving his reasons for the above conclusions, fails almost wholly to discuss the evidence properly and clearly bearing upon these important issues, while pages of the opinion are devoted to what may fairly be called a very learned attempt to elucidate, explain, and argue the testimony bearing upon *collateral issues* raised, not by *the pleadings* but by the *evidence only* and the decision of which does not necessarily affect the *real issues* of the case one way or the other. Reference is here made firstly, and more particularly, to the controversy raised *by the testimony* as to whether Hayden did or did not write the mortgage, upon the foreclosure of which the premises were subsequently sold. Suppose it were true, and the evidence fails to justify the assumption, that Hayden *did* write this mortgage March 2, 1859. It does not follow therefore, that he was Mrs. Dove's attorney on March 5, 1864, *five years* subsequently. Suppose Hayden was the attorney of Mrs. Dove for the purpose of writing a mortgage March 2, 1859, does it follow he was her attorney on a foreclosure suit of that mortgage *five years* afterward? The issue in reference to the writing of this mortgage, whether made by the pleadings or evidence or both (and it is only raised by the latter) is a wholly *immaterial* one in so far as the real pertinent questions involved in this litigation are concerned. The question is "Was the confidential relation of attorney and client *existing* between Hayden and Mrs.

Dove in respect to these proceedings, March 5, 1864, the date of Hayden's purchase at sheriff's sale of these premises," and *not* whether that relation existed *years before* in reference *to some matter not in court.* Nor would the fact that Hayden *had* written the mortgage, and in giving his testimony *fourteen years* afterward had stated that he had *not* written it, be any very strong ground upon which to base an argument impeaching his veracity, for the reason that it would not be a strange circumstance—that any man in such a lapse of time would wholly forget the fact.

And yet, about the only reasons given by the Court below for finding, as a question of fact, that Hayden was Mrs. Dove's attorney at the date of the sale, March, 1864, are found in a remarkably lengthy and more than ordinary erudite and attractive discussion of the very abstruse questions of *comparison of hand-writing* this too bearing upon a *collateral* question raised *by the evidence* as to whether Hayden *did* or did *not* write a certain mortgage *five years* before; and what seems yet more passing strange is the fact that it never once occurred to the very able and watchful attorneys for the Doves, during the long period during which testimony was being taken in this case, that there was any question of handwriting involved in this controversy, as not a solitary expert in writing was called to the witness stand to describe *the alleged differences* between the R's, B's, D's, P's, and figure 9's in the *body* of the mortgage and those used in the *certificate* to the same. No expert called to point out how B—*h*uel was first written, and then, as it is alleged in the argument of the court, changed to B—*th*uel "by making the loop of an *h* upon the *m* stroke, or lower part of the first *h* and thus converting the latter into a *t*;" nor yet did any expert witness describe how "the loop of the second *h* did not come directly upon the *m* stroke of the first one, but at an angle on the outside," thus leaving "*the process of emendation quite apparent.*" No one skilled in the use of the pen and learned in the manifold formations and combinations of letters

comes to point out to us *under oath* that "the terminal D's in the *writings*" (the receipt and the mortgage, the one of which Hayden swears he *did* write and the other he did *not*) are "*uniformly made, with an upward and outward curl from the O instead of the stem*," and that *the initial and middle ones are just as constantly made with a stem, which is well detached from the body of the O, the letter being open.*" No expert to tell us, nor so far as the record in this case advises us, did it ever occur to the learned counsel for the Doves "that the figure 8 in the two writings is *very similar*," or that; in the poetic description of the court below, "*they are as like as two black-eyed peas.*" All these things escaped the closest scrutiny of the Doves and their lawyers, and for the first time in the weary history of this case are mentioned, taken up, and to the exclusion of most else, and especially of the more important matters, discussed and elaborated by the learned court. And it is upon this character of *reasoning* by the court, unsupported as it is seen by any *expert* testimony whatever or any other *testimony*, aside from interested parties; upon this comparison of hand-writing *by the court* an argument of the most dangerous character, *and this alone*, the court below would, and does over throw the positive testimony:

1. Of Hayden, an interested party it is is true, who swears positively that he did *not* write the mortgage in question, and

2. Of R. R. Boothby, a wholly disinterested witness, at the time a justice of the peace, and who took the acknowledgement of and was one of the witnesses to the deed, who swears *he* Boothby *did* write it.

That the court below had the *technical right* to make this *comparison of hand-writing*, and in this way pass upon this collateral question as to who wrote this mortgage is not here being questioned; as the case in this respect comes, perhaps, within the exception recognized under the general rule of

common law which does not permit a comparison of hand-writing as proof of a signature by either court or jury. And the right perhaps exists also by statute, it is not, however, a common thing for courts to raise such a question when *counsel has not suggested* it by any *expert testimony.*

Benjamin Hayden in his testimony says:

"This paper exhibit No. 1, (mortgage) filed in this cause is *not* my hand-writing, *nor any portion of it.* I couldn't say in whose hand-writing it is. I had no connection with the preparation or draughting of that mortgage." (Tran. p. 95)

R. R. Boothby who signed the mortgage as a witness and who as a justice of the peace took the acknowledgement to it, testifies as follows:

"The name Reason R. Boothby, J. P. signed to certificate of acknowledgement of this mortgage *is in my hand-writing.* That acknowledgement was taken by me in March, 1859, at Mr. Dove's house. There were present George Bolter, Theodore Ingalls, B. Dove and his wife, and myself. *I wrote the mortgage at Mr. Dove's house at the time it was signed. I wrote the whole of it except the signatures* of George Bolter and Theodore Ingalls: * * * The signature of R. R. Boothby, one of the attesting witnesses is in my hand-writing." (Record Tran. p. 77.)

On cross-examination this witness said:

"I am positive that I wrote all that filling in and descriptions of parties and land." The mortgage was a printed blank. (Tran. p. 77.)

Here is therefore the positive testimony of Hayden that he did *not* write this mortgage, and also the positive testimony of Reason R. Boothby a wholly disinterested witness, and one of the witnesses to the mortgage that *he did write it.* In opposition to this are the statements only of Bethuel Dove and Rachel Dove, parties in interest, who say Hayden wrote it. But Mrs. Dove testifies just as positively that "Mr. Bol-

ter and *Mr. Washburne* signed the mortgage as witnesses" as she does that Mr. Hayden *wrote* the mortgage. And yet the *fact is*, as shown by the original mortgage now in court "*Mr. Washburne*" never signed it as a witness, but the witnesses are, as correctly stated by the witness Boothby, "George Bolter, R. R. Boothby, and Theodore Ingalls."

As an evidence of the treacherous character of Mrs. Rachel Dove's memory, generally, and in respect of the particulars of this transaction in particular, it is only necessary to quote from her testimony. On direct-examination she states:

"Mr. Bolter and Mr. Washburne signed as witnesses; Mr. Bolter lives at Humboldt; I don't know where Mr. Washburn is; they signed as witnesses the day after it was written, and the same time I signed it."

On cross-examination she said:

I am sure that Mr. Washburne signed that mortgage as a witness; I am as sure of that as I am of anything I have stated; Mr. Ingalls was there the day the mortgage was signed, but he wasn't in the house; he was out at the barn looking at some cattle; *I am sure that Ingalls did not sign the mortgage as a witness.*" (Tran., p. 60.)

And yet the indisputable fact is, Ingalls *did* sign the mortgage as a witness, while Washburne did *not.* (See Exhibit 1, Transcript, p. 120.)

But again Rachel Dove, in her testimony in chief, fixes the transaction of the execution of this mortgage in one or the other of the years 1862 or 1863, she does not seem to remember which. She says:

"Have been acquainted with him (Hayden) ever since he came to the country; *in the year 1862 or 1863 I had business with him relating to a mortgage.*" (Tran., p. 58).

Whereas the truth is, the mortgage in question was both written and executed on the 2d day of March, A. D. 1859,

three years prior to the earliest date fixed by the witness as the date of the transaction.

Again, Rachel Dove, on cross-examination, states positively as follows:

"We lived on the place *several years* after Mr. Hayden bought it," (see Transcript, p. 61).

And yet her son and other witnesses for the Doves testify that the Doves moved off the farm in the fall of 1864, *within nine months from the date of Mr. Hayden's purchase*, (see Tran., p. 56,) although Bethuel Dove continued to use the place and get the benefit of it, the whole of it, all of the year in which it was sold (1864), and a portion of it the next year (1865). (Tran., p. 102).

But in addition to all this, it is respectfully submitted the argument of the Court below in reference to the comparison of handwriting *is not well taken.* It is conceded Boothby wrote the *certificate of acknowledgement* to the mortgage; it is also admitted that Hayden wrote the *receipt* of July 26, 1864. The contention of the Court below is, that there is such a similarity in the formation of the letters, figures, and words used in the receipt and those used in the body of the mortgage as to induce the belief, and justify the conclusion, that they were written by the same person, and therefore by Hayden, and that there is such a *dis*similarity between the writing in the certificate to the mortgage and that in the body of the mortgage as to justify the belief that they were *not* written by the same person. The fact is, there is a striking similarity in the handwriting of Benjamin Hayden and Mr. Boothby, and this Court is respectfully asked to compare the formation of the letters, especially the capital Bs, Rs, Ps and Js in the signature "Reason R. Boothby, J. P." to the certificate of acknowledgement, which was confessedly written by Boothby, with the same capital letters in the receipt of July 26, 1864, which it is conceded was written by Hayden, and it will be found

that a much greater similitude exists than can be found to exist between the letters, words and figures used in the *receipt* and those employed in the *body* of the mortgage, and upon the *alleged sameness of which* the whole argument is based that Hayden wrote both; whereas, as is abundantly shown by the argument of the Court below upon this question, it is only by the most subtle reasoning that any distinctive difference is made appreciable to the most acute perception between the formation of the letters and words used in the *body* of the mortgage and those used in the *certificate* of acknowledgement; while an equally labored effort, bringing to bear a similar *subtlety of argument*, is necessary to disclose any greater, or as great, a similarity between the handwriting in the *body* of the mortgage and the *receipt* than is apparent to the most casual observer between that in the *certificate* of *acknowledgment* and that in the *receipt.*

To convict a man of a *heinous fraud* upon any such argument as that employed by the court below, upon this phase of the case, is to ignore every principle of jurisprudence applicable to equity proceedings.

The fact is, Hayden swears positively he did *not* write the mortgage; Boothby swears positively *he* wrote it; and no *artfulness of reasoning* upon the question of *similarity of handwriting* can or should, either at law or in equity, overthrow such direct and positive testimony unless, indeed, the case on the question of handwriting could be made apparent and conclusive to all, without such *elaborate effort* as that of the court below in this case.

As bearing upon this question of handwriting attention is called to the following extract from a recent opinion of the Court in case Resty *vs.* Indianapolis & I. R. R. Co., 7th Circ. (Ind.) 1877, 7 Biss., 408:

"Men, even good scribes, do not always sign their names exactly the same way. Dissimilitude may be occasioned by a variety of circumstances, by the state of the health and

spirits of the writer, by the materials, by his position, and by his hurry or care."

In this case Boothby swears he wrote both the certificate of acknowledgment and filled in the body of the mortgage. The Court, however, while admitting he wrote the certificate, held on *comparison of handwriting* that he did *not* fill in the body of the mortgage.

WAS THERE AN AGREEMENT THAT HAYDEN SHOULD PURCHASE THE PROPERTY FOR THE BENEFIT OF MRS. DOVE?

But upon what evidence can it be rightfully held that there was an agreement or understanding between Hayden and the Doves *prior* to the sheriff's sale, to the effect that Hayden should bid in the property as the attorney and friend of the Doves and for their benefit? A careful analysis of the testimony of Rachel and Bethuel Dove, one of the parties to such alleged arrangement, so far from establishing any such agreement or understanding, most *conclusively* shows that there was *no* such *agreement* or *understanding*.

It is claimed in behalf of the Doves that there was such an agreement, and that had it not been for this fact, that they—the Doves—would have made other arrangements to have had the land bid off in their interest; and that in fact they relied on Hayden, and were thus prevented from making other arrangements.

Now to the testimony, *pro* and *con*, in support of such claim: And here the emphatic and unqualified statement is made, and it is fully borne out by the testimony, that not a solitary word, according to the evidence of both Rachel and Bethuel Dove, ever passed between them or either of them and the defendant Hayden, upon the subject of the purchase of said premises at the sheriff's sale *prior* to such sale. Not a *particle of evidence* is there in this case to the effect that either Rachel or Bethuel Dove, *separately* or *jointly* ever in *any manner* solicited Hayden, as their attorney, agent, friend, or otherwise, to bid in said premises at such sale, either for

their benefit or otherwise; upon the contrary, both Rachel and Bethuel Dove *swear positively that they never had any conversation whatever with Hayden prior to the sale about buying in the land for them or either of them.*

It will be borne in mind that Mrs. Mary E. Manning, daughter of the Doves, and wife of the plaintiff, and E. P. Dove, the son of the Doves, testify that on the day of the sheriff's sale, Hayden told them respectively—Mrs. Manning at the house of her father, Bethuel Dove, and E. P. Dove at Eola—in substance and effect, to tell their mother that he (Hayden) had left a man to bid off the place, and that these messages had subsequently, whether on the same day or later does not clearly appear, been delivered by them to their mother, Rachel Dove.

Mrs. Manning's testimony on this point is as follows:

Direct int. 7. State whether or not the defendant Hayden left any word or message with you in the spring of 1864, or about that time, for your mother concerning her lands. If so, state fully what that word or message was.

Ans. He left a message. He said he had left a man in his place to bid the lands in for my mother. * * * I delivered the message to my mother.

On cross-examination this witness states that "I heard Hayden say, or he told me, that he had left a man to bid in the land, and that he could not be there himself;" and when interrogated as to the time of day this occurred, she said:

"*I think it was in the afternoon.*" (Transcript, pp. 43–44.)

That is to say, this alleged message was delivered to Mrs. Manning by Hayden on the *afternoon* of the day of the sheriff's sale, and Mrs. Manning delivered it to Mrs. Dove, who was absent from home that day—either on that evening or at some subsequent time.

E. P. Dove's testimony on this point is as follows, in substance and effect:

"I saw the defendant Hayden the day of the sheriff's sale at Eola, in Polk county; don't remember the time of day.

He told me to tell my mother not to be uneasy, that he had left a man there to bid off the place for her. Mr. Hayden said it was to be sold that day." (Transcript, pp. 54–55.)

This alleged message Dove swears he conveyed to his mother, but, according to his own statement, not until *after* the sale was over.

Mrs. Rachel Dove, in her testimony upon this point, makes this unqualified statement:

"*I had no conversation as I know of with Mr. Hayden about buying in the lands for me prior to sending me those messages.*" (Tran. p. 61.)

In this she had reference to the alleged messages delivered to her by her daughter, Mrs. Manning, and her son, E. P. Dove, neither of which according to their testimony was delivered until *after* the sale had taken place. But Mrs. Rachel Dove further testifying places the matter beyond all controversy when she says:

"*I never had any conversation as I recollect with Mr. Hayden before the sale about his buying in the land.*" (Trans., page 61.)

Most assuredly in the face of these most damaging admissions upon the part of Rachel Dove, this Court will hesitate long before finding as a *fact* as the court below found, that there was an *agreement and understanding* between Rachel Dove and Hayden, *prior to the sheriff's sale;* to the effect that he, Hayden, should bid in the land for her.

But how is it in reference to an agreement or understanding between *Bethuel Dove* and Hayden? What is Bethuel Dove's testimony on this point? It is equally clear and explicit in admitting away the plaintiff's case upon this point. He says:

"*I don't know as Hayden and me had ever talked before* (that is before the sale) *about his bidding in the land. I never asked him to do it, as I recollect of. I don't know as Hayden and my*

wife had ever talked about his bidding in the land for her prior to his sending her that message." (Tran. p. 65.)

From this it is clear that neither Rachel nor Bethuel Dove had ever *one word of conversation* with Hayden *prior to the sale*, in regard to the bidding in of the property; neither of them had ever requested Hayden to bid in the property, nor had he ever intimated to either of them, so far as the testimony discloses, that he would do so.

It is not even pretended upon the part of the Doves that they had either *furnished Hayden with any money* to meet any bid he might make on the land, or *given him any instructions or hint* as to *the amount he should bid.* Not a word on this subject had ever passed between them.

And yet a tremendous parade is made in the testimony of these witnesses Rachel and Bethuel Dove to the effect, that *but* for the message which it is alleged Hayden sent Mrs. Rachel Dove *on the day of the sale*, but which it is not contended she received until *after* the sale, to the effect, as claimed, that he had left a man to bid in the premises, they, the Doves would have made "*other arrangements*" in reference to the purchase of this property at the sheriff's sale. To make apparent the *supreme absurdity* of any such claim, it is only necessary to call attention to the fact, that, according to *all* the testimony neither Rachel nor Bethuel Dove received this *alleged* message until *after* the sale had actually taken place, and not only so, but according to the testimony of both Mrs. Manning and E. P. Dove it was not received by either of them, from Hayden, until the *afternoon of the day of sale.* That any such message ever was delivered, is *positively denied by Hayden in his testimony*, and the singular manner of the story told by Mrs. Manning and young Dove, the similarity of the alleged messages as described by each, to wit: "*He has left a man there to bid the place off*," the fact that Mrs. Manning was only 16 years of age at the date of this alleged communication; that it rested in memory *only*,

and was detailed by them *fourteen years* after it occurred, together with the fact that these witnesses are both the children of Bethuel and Rachel Dove, and one the wife of the plaintiff, would seem to be sufficient to justify a court in declining to hold it a sufficient basis upon which to sustain an equity against Hayden.

Bethuel Dove, in testifying further upon this point, says:

"I don't know what time of day it was that the message was left at my house for my wife; I was not at home; I learned next day, I believe, that such a message had been left there." (Tran., p. 65).

And yet in the face of these admissions, that this alleged message was not received until after the sale, the unblushing claim is made by the Doves in the same breath, as follows:

Bethuel Dove's examination continued:

Question 18. At the time that Mrs. Dove received word from Mr. Hayden that he would bid on the place, what reliance, if any, was placed in that statement by you and Mrs. Dove?

Answer. We had all the confidence in the world that he would do just as he said he would.

Q. 19. What, if anything, would you have done about purchasing in the property, if the defendant had not sent any word to Mrs. Dove?

A. *We would have let Mr. Jones bid the place off—Wm. Jones.*" (Tran. p. 64).

Mrs. Rachel Dove also, in her testimony joins in this *unconscionable claim*, that by this alleged message from Hayden, which it is not claimed she received until *after the sale was over* she was lulled into a state of conscious security and consequent inaction, and thereby *prevented* from making "*other arrangements*" for the purchase of the land.

In her direct-examination she testifies as follows:

Q. 12. State what she said to you (that is, her daughter, Mrs. Manning,) as being the message of Mr. Hayden.

A. She told me that Mr. Hayden told her to tell me that I should not be scared, that he would bid it in a-purpose for me.

Q. 13. State whether or no you believed that Mr. Hayden would do as he sent you word he would.

A. Yes, sir; I thought he would do as he said.

Q. How far, if at all, *did you rely upon the statements* which were made to you as coming from Mr. Hayden in regard to his making this purchase?

A. I believed he would do as he said he would.

Q. What, if anything, would you have done about buying the land if he had not sent you any word at all?

A. If he had not sent such words as them we could have got somebody else to attend to it; we could have tried to get somebody else to attend to it.

Q. Could you at that time have made arrangements to buy in the place yourself?

A. Yes, sir; I could have made other arrangements. (Transcript, pages 58, 59.

Could anything be more *cruelly false* than this *grossly unwarranted assumption* on the part of these witnesses—Bethuel and Rachel Dove—that they were by this alleged message of Hayden (and for the sake of this argument it may be admitted the message was sent as alleged) *prevented* from making "*other arrangements*" in reference to the purchase of the land? The maxim, *qui nimium probat, nihil probat*, finds good application here.

This sale took place at Dallas, the county seat. The Doves lived *twelve miles* distant from Dallas, and this alleged message was not delivered by Hayden to Mrs. Manning, at Dove's house, until the afternoon of the same day; nor to E. P. Dove, at Eola, over twelve miles distant from Dallas, until the same afternoon; and *not one word had ever transpired between the Doves—or either of them*—and Hayden *prior to the sale* upon the subject of bidding in said premises, and yet, it is seriously contended *under oath* by Bethuel and Rachel Dove, that *but* for this alleged message, they would have made "*other arrangements*," they would "*have let Wm. Jones bid the place off.*"

Is it not fair to presume that if, as sworn to by both the Doves, *not a word had passed between them and Hayden*

prior to the sale in regard to bidding in the property, and if it be true, as also sworn to by them, that but for this alleged message, they would have made "other arrangements," by getting "Wm. Jones to bid the place off," that they would have had, *prior to the day of the sale* some arrangment with Wm. Jones, or some *other* person to be at the sale and bid in the property? But nothing of this kind is pretended. On the contrary, Bethuel Dove did not attend the sale, nor was Wm. Jones there, nor was there any former promise upon his part, or arrangement between him and the Doves that was revoked or countermanded after the receipt of the alleged message from Hayden by which he was to be present and bid off the property.

Upon this point Bethuel Dove testifies follows:

I was not present at the sheriff's sale when the land was sold; I don't know exactly where I was; I think I was in Polk County; my wife did not attend the sale; I think Wm. Jones did not attend the sale; I don't know where he was that day; I lived then about twelve miles from Dallas. (Tran. p. 64.)

Again, Rachel Dove says in her cross-examination:

We didn't try to borrow money to pay off the mortgage before the land was sold. *I never tried to make other arrangements*, but I know we could have got somebody else besides Mr. Hayden; *nothing was said between Mr. Hayden and us about how much he was to bid for the land for us.* (Tran. p. 61.)

Aside from the foregoing the only testimony tending even to prove any understanding or agreement upon the part of Hayden to bid in the land for the benefit of the Doves, consists of certain alleged *admissions* of Hayden to Mordecai Kennedy, G. W. Lawson, and P. C. Sullivan.

In reference to the testimony of these three witnesses it is legitimate argument to state that the former, Mordecai Kennedy, was, according to his own admission under oath, *indicted for perjury* in the circuit court of the State of Oregon,

for the County of Polk, in the fall of 1869, for not giving in his property correctly to the assessor. The indictment, it is true, was subsequently dismissed by the prosecuting attorney. Evidently from the testimony, however, because of the death of Mr. Ford, the prosecuting witness, which occurred before the case came to trial.

While the other two witnesses, Lawson and Sullivan, were both in certain stages of this litigation—and the former all through this case—attorneys for the Doves, and it is quite evident, as will appear later in this paper, that this litigation was not originated by the Doves on their own motion, but was *inspired originally by Sullivan* more than *ten years* after Hayden had purchased these premises, paid his money for them, and received his sheriff's deed.

So far, moreover, as the testimony of Mr. Lawson on this point ~~part~~ is concerned, it is against the theory that there was a *prior* agreement or understanding between Hayden and the Doves, by which Hayden was to bid off the premises for their benefit, and that he had done so; and on the contrary sustains, *substantially* the claim of Hayden, to the effect that *after* he had purchased the property at sheriff's sale he had generously given Mr. Dove an opportunity to purchase the land, by reimbursing him within a certain time, a year, his purchase money with interest. Upon this point Mr. Lawson, after testifying that he was employed by Rachel Dove in 1874 to take a case against Mr. Hayden to recover the land in question, and that he had made a certain demand of Hayden, states further that he had in April, 1874, a conversation with Hayden in regard to the matter, in which Hayden, among other things, said to him, this:

* * * "The land was put up at public auction at sheriff's sale to be sold to the highest bidder, and he had just as good a right to buy it as any other man; that he gave her a chance to redeem the land and she did'nt do it." (Trans. p. 70.)

And this accords substantially with Hayden's testimony

as to the nature of this conversation between Lawson and him so far as it related to this phase of the case, except as it fixes the offer as having been made to *Mrs.* instead of *Mr.* Dove. Hayden in his testimony says:

"I told Mr. Lawson that I had agreed with Mr. Dove that if he would pay me my money, with interest, within one year, I would sell him the property, and make him a deed to the property." (Trans., p. 99).

It is also proper to state that Hayden *denies positively, under oath* that he made to the witnesses, Mordecai Kennedy and P. C. Sullivan, any such statements as their testimony attributes to him.

Besides, the witness Mordecai Kennedy is positively contradicted in a material statement by the witness J. B. V. Butler.

Kennedy in his testimony makes this statement:

* * * "I heard Hayden and Butler (in 1865) talking together about the Dove land, and Butler seemed to be interested in some way, as though he wanted Hayden to assist him; I couldn't state whether they were trying to get a mortgage from her (Mrs. Dove) or not; from the best of my recollection it seems that Butler was trying to get Hayden to have him, Butler, released in some way from his security; it appeared, from my understanding of it, that Butler was surety for Dove and wanted in some way to be secured. (Trans., p. 69).

Whereas, J. B. V. Butler on being interrogated as to this alleged conversation, testified as follows:

I have no knowledge of any conversation, in 1865, between me and Mr. Hayden at which Mr. Kennedy was present, about myself (Butler) having any interest in the land or wanting Hayden to assist me; I never had any interest in the south half (Mrs. Dove's half) of that claim. * * I never talked with Hayden about getting a mortgage from Dove to secure me in regard to those claims; I think I was not security in any way for Dove in 1865; I never, that I

know of, had any conversation with Ben. Hayden about getting a mortgage for me upon Mrs. Dove's land to secure me as Dove's security or surety; I never tried to get Dove and his wife to give me a mortgage on the south half of the Dove Donation claim. (Tran., p. 80.)

Here it will be seen the witness Mordecai Kennedy is *flatly contradicted* in a *material statement* by Judge J. B. V. Butler, a witness whose reputation for truth and veracity, or for integrity in any respect, has never been impeached, as has that of Kennedy, by an indictment for perjury, or in any other manner.

In addition to the fact of Kennedy's indictment for perjury—of his remaining absent from the county in eastern Oregon until the death of Colonel Ford, the prosecuting witness, after which the indictment was dismissed; (Tran. p. 98) of his direct impeachment by the witness Butler; and of the further fact that P. C. Sullivan was, according to his own testimony, at one time the attorney of the Doves in reference to the subject matter of this suit (Tran. p. 72)—it should be borne in mind that some *seven* of the best citizens of the community in which P. C. Sullivan resided and practiced law for many years, testify in the strongest terms to his *bad reputation for truth and veracity*, and to his being an *intriguer, promoter of questionable litigation* and of *disreputable character generally in his capacity as an attorney-at-law* while not a *solitary witness* was called by the attorneys of the Doves to refute the testimony of these witnesses, or sustain the reputation or character of their witness, Sullivan. Nor could they with any assurance of success, when included in the witnesses for Hayden on this point are such men as Hon. B. F. Bonham, late Chief-Justice of the Supreme Court of the State of Oregon, and at present an honored and highly respected member of the Oregon bar; Hon. Asahel Bush, one of Oregon's foremost and best citizens, long, and now, the leading banker of the capital of the State, and also Superintendent of the Oregon State Penitentiary; John J. Daly,

Esq., a citizen of Dallas, and a leading and much respected member of the bar. The other witnesses upon this point, T. M. Thompson, Esq., E. A. Graham, Esq., J. I. Thompson, Esq., and Hon. H. N. V. Holmes, are also all men of the highest character, *as the attorneys for the Doves must concede.*

Permit a brief *résume* of the testimony of these witnesses.

Hon. B. F. Bonham says:

"Am acquainted with P. C. Sullivan; have known him since 1863; he resided the first two years I knew him at La Grande, Union County, Oregon; for the past twelve years in this (Marion County) and in Polk County; (These counties adjoin each other.) *I am acquainted with his reputation for truth and veracity in the neighborhoods in which he has resided in Polk County, and in this* Marion County. *I might say that, for a number of years past, the last twelve or thirteen years and up to the present time; I have regarded his reputation for truth and veracity as bad;* I mean his reputation *as considered by the people;* I have conversed about it."

On cross-examination this witness said:

"His business has been the practice of law since I knew him. * * * He is *reputed* to have what is regarded *as a disreputable practice in a certain line of business in the United States Circuit and District Courts for Oregon.*"

On re-direct, Judge Bonham further testifies as follows:

"*I mean by saying he had a disreputable practice, it was very generally understood that he has been engaged for some years past in what the people here regard as black-mailing practice, carried on by obtaining transfers of title to a son of his, who is alleged to be a non-resident of the State, which it is supposed by the people was done for the purpose of divesting the State courts of jurisdiction, and compelling persons with whom he is engaged in litigation about land titles to be subjected to the increased expense, trouble, and annoyances of defending their titles away from their homes, so as to compel them to compromise with him. * * He is said to have been engaged for a number of years, and had some assistants, in the careful examination of records of conveyances,*

and of records of judicial sales, in this county particularly for the purpose of finding some *technical* or *other defect* in the *record evidences of title*, and having discovered such a defect he is generally reputed to have been in the habit of *writing letters to heirs or grantors of land who might claim the land they were divested of, and offering to give them a share of the lands if he should succeed.*" (Tran. p. 85, 86.)

T. M. Thompson, Esq., says:

"Am fifty years of age; reside in Salem; am acquainted with P. C. Sullivan. I have known him ten or fifteen years. During the time I have known him he resided on the Yamhill River, Polk County, then at Dallas, then here in Salem. I think he has been here in Salem about three years. I resided in Dallas and was a close neighbor to him the whole time, I knew him, excepting the time he lived here at Salem, and the time he lived on the Yamhill. I moved here about six months ago. *I am acquainted with the reputation for truth and veracity of P. C. Sullivan, both at Dallas and at Salem. I have heard very few people speak well of him. His reputation for truth and veracity in those places I should regard as bad.*"

On cross-examination this witness said:

"My opinion of his reputation is partly based upon his getting up these land suits, but that is only one ground of it." (Tran. 86.)

H. N. V. Holmes testified as follows:

"Am 64 years old; reside in Salem, Oregon; have known P. C. Sullivan some thirteen or fourteen years. * * *I am acquainted with his reputation for truth and veracity, both at Dallas and at Salem; people have generally been talking about him; I don't think I ever heard a good word spoken of him; his reputation for truth and veracity in those neighborhoods where I have known him has been bad.*"

On cross-examination he said:

All the conversation I have ever heard has been about his *general character in business for truthfulness and veracity;* I suppose these land suits have had some effect in creating public opinion; *but long before he was engaged in them, or I ever heard of his being engaged in them, his character was the same.*" (Tran. p. 86.)

J. I. Thompson testified as follows:

"Age 51 years; live in Salem, Oregon; I resided in Polk County from the fall of 1858 until October last; I was County Clerk of Polk County from 1865 until 1870; I am acquainted with P. C. Sullivan; I have known him since 1863; he first resided on Salt Creek, in Polk County; then in Dallas; then at Salem, Oregon; I am acquainted with his reputation for truth and veracity, in the neighborhoods where I have known him; *that reputation is not very good.*"

Being cross-examined this witness said:

"If he was called as a witness in a cause, and had no interest either way, I would hate to say I wouldn't believe him under oath; *I would hate to say that of any man.*" (Tran. p. 87.)

E. A. Graham sworn, said:

"Am 44 years old; live in Salem, Oregon; I first moved to Polk County in 1860; lived there till 1862, then moved away and came back to the county in 1866; I am acquainted with P. C. Sullivan; have known him since 1864; he then lived near the Yamhill River; he next resided at Dallas; he resided there some four or five years; then came here to practice; *I am acquainted with his reputation for truth and veracity among the people where he has resided in these several neighborhoods; it is not good.*

On cross-examination Mr. Graham said:

"Mr. Sullivan got up excitements there in Polk County about lands and patents; I got Mr. Sullivan to look after my patent, and supposed he was attending to it all right, and the first thing I knew *he was buying all the heirs out, or was trying to buy them out getting quit-claim deeds.* That is the only trouble I ever had with him. (Tran. p. 87.)

Hon. Asahel Bush sworn, said:

"Age 53; I live in Salem; I am a farmer and a banker; I am acquainted with P. C. Sullivan; I have known him over ten years; *I have known him well for eight or ten years*; he has been residing at Portland, and at Polk County, and at Salem; I am told he has left Salem and gone east of the mountains; he went away quite recently; he resided here (Salem) some three or four years; *I am acquainted with his reputation for truth and veracity in Salem, and somewhat in Polk; that reputation is bad.*"

On cross-examination, Mr. Bush said:

"He is an attorney; I mean by the reputation for truth and veracity, *the general confidence of the community in his word, and in his statements; the general expression of opinion about him in that regard;* I use the expression in this sense, that it is a *common remark* that his *reputation for truth is bad.* Some two years ago, I think, I heard it said he *was to be impeached in a case*, and that *witnesses were brought from Polk County to impeach him*, and I have heard *he has been contradicted by statements in cases where he was a witness*; I don't mean to say he is a common and constant liar." (Tran. p. 92.)

Enough has been shown in this connection to establish very clearly these *two* propositions:

1. That the evidence of P. C. Sullivan and Mordecai Kennedy as to the alleged admissions of Hayden (Tran. p. 72) is not entitled *to any credence whatever.* And

2. That the Doves first conceived the idea of contesting Hayden's right to the land in question, through the instigation of Sullivan, who, according to the testimony of Judge Bonham and others, was engaged in what was generally regarded as a *disreputable practice*, who for years had been *overhauling records* for the purpose of discovering *technical errors* whereby grantors might take *unconscionable advantages* of their grantees; who, in other words, had, for years been under cover of the forms of law, and the mantle of his pro-

fession, engaged in the *piratical business* of levying *black-mail* upon every man in the community, whose record of title to his land might be found to contain some *technical error*. Who had for years prostituted the profession he disgraced, by engaging, *on his own motion*, with a view to *future questionable litigation*, in diligent and exhaustive search for such *technical errors* in the *records of titles*, as might be made available in his hands in the overthrow of *honest business transactions*, and the *cancellation of records made in good faith.*

Passing therefore from the testimony of Lawson, Sullivan and Kennedy in reference to the alleged admissions of Hayden, to the effect that he had bid off the land for the benefit of the Doves, and from a somewhat extended consideration of the question as to the weight that should be given to such testimony, the attention of the Court is attracted to further evidence upon the part of Hayden tending to sustain his (Hayden's) testimony, and to the refutation of the claim that there was, as found by the court below, "*an understanding and agreement*" by which Hayden was to bid in the land in dispute for the benefit of Mrs. Dove.

James Jones, called as a witness by Hayden, testified as follows:

"Age 54 years; reside in Polk County, Oregon; am acquainted with Bethuel Dove."

Question. Did Bethuel Dove in the fall of 1864, near the house where he then resided, in the road out by the orchard, on the place in controversy in this suit, say to you and your wife, that Hayden, the defendant in this suit, had bought the land in controversy in this suit and paid for it; and that he was satisfied he would never get it back, but that he had to tell the old lady (meaning his wife) so to pacify her, or words to that effect?

Answer. It wasn't expressed exactly that way. It was in the house Mr. Dove told four of us there, Bill Tillotson, George Bolter, myself and my wife, that his land was all out of his hands and he never expected to get it back; *but he had to tell Rachel that he would, to keep her pacified.*" (Tran. p. 75.)

To the same effect is the testimony of A. H. Simpson (Tran. p. 83.) and of Elizabeth E. Jones. (Tran. p. 93.)

Bearing upon this same point, andin direct contradiction moreover of the statements of E. P. Dove, who testified that *on the day of the sheriff's sale* Hayden was *at Eola, Polk County*, and there told him he had left a man to bid off the land, is the testimony of W. T. Clingan, who states that Hayden was with him on the day of the sheriff's sale at Red Prairie, twelve miles distant, *in an entirely different direction from Dallas, where the sale took place, than is Eola.*

This witness says:

Hayden was with me on the Red Prairie the day of the sale of that land; he went over there to a political speaking; Red Prairie is about *twelve miles* from Dallas by the road; it is northwest from Dallas. * * * Defendant and I went together from Dallas to Red Prairie; I suppose we started about nine o'clock in the morning; we wanted to get there to the afternoon speaking; we came back together the next morning; *I know that Hayden didn't come back to Dallas in the meantime; we started back together, and stopped all night on the road.*"

On cross-examination, in giving reasons why he, the witness, remembered that this political speaking was on the day of this sheriff's sale, he said:

When I went to Hayden's to get him to go and make this speech, he said he had to attend this sale; he said he would get Mr. Baldwin to go over to the court-house and attend to it; I saw Baldwin and Hayden meet on Hayden's return, and Mr. Baldwin said to Mr. Hayden he had bought the land, and they went together over to the court-house. (Tran., p. 91).

And this, while flatly contradicting E. P. Dove, fully sustains Hayden. Hayden upon this question says in his testimony:

"On the day of the sheriff's sale of this land I left Dallas in the morning and went out to Jackson precinct, *some twelve*

or fifteen miles northwest of Dallas, and remained there to attend a political meeting, and remained there until next morning, and then returned to Dallas; *I was not nearer Eola than Dallas that day*; a man by the name of John Baldwin acted for me at the sale; he went back to Missouri and died there; I requested him to bid for me at that sale; *I did not see any of the Dove family between the time I asked Baldwin to bid for me and the time of the sale, nor for several weeks prior that I can recollect of.*" (Tran. p. 96.)

It is confidently submitted that this testimony, fairly considered, so far from justifiying the conclusion that there was any "understanding" or "agreement" between Hayden and the Doves, or either of them, to the effect that Hayden should bid off the land in Mrs. Dove's interest, as found erroneously by the Court below, establishes *conclusively* that there was *no such understanding or agreement*; and at the same time goes far, moreover, to negative the claim that Hayden was at the date of the sheriff's sale the attorney of the Doves, or either of them, or that the Doves, so considered him at that time. But of this more hereafter.

And yet, notwithstanding all this, the circuit court district judge presiding, found, among other things, the following facts to be "*satisfactorily established*," to wit:

"That *at the date of such sale* the defendant (Hayden) was the *attorney of said Bethuel and Rachel in said matter*; and, moreover, in making such purchase and receiving said conveyance was acting on behalf of said Doves *in pursuance* of an *understanding* between himself and them, whereby the defendant (Hayden) was to bid in said premises at the sale, *in case they went low enough*, as was expected, for the benefit of said Rachel, who was to redeem the same *as soon as she could, in a reasonable time*, and thereby secure a home for herself and husband in their poverty and old age; and that said Bethuel and Rachel *relied upon said understanding*, and thereupon *took no other steps* or means to secure the property, or redeem it within the time allowed by statute, as they might and would otherwise have done." (See Opinion, Transcript, page 26.)

It is respectfully insisted that there was in these findings of fact *manifest error*. The *evidence* will not warrant them. The conclusions are *forced*, *illogical*, and *false*. While no *material part* of these findings is justified by the testimony, several of the elements essential to their symmetry and conclusiveness, such as that Hayden was to bid in the premises "in case they *went low enough, as was expected*," &c., and that "*Rachel was to redeem the same as soon as she could, in a reasonable time*," are *assumed* by the learned court below, for what reason or upon what theory may or may not be apparent, and injected into the findings of fact, *without one particle of evidence to support them*. What witness makes the slightest reference, *directly* or *indirectly* to the *amount that Hayden was to bid*, whether a *high* or a *low* figure? What witness as much as *hints* at the existence of any "*understanding*" or "*agreement*" to the effect that "*Rachel was to redeem the land as soon as she could, in a reasonable time*," if we may except a very loose reference to it made by the impeached witness P. C. Sullivan? Not one; nor do all or any of the circumstances of the case justify any such inferences.

But the court below further erred in finding from the evidence that "on July 26, 1864, said Bethuel, *in pursuance of said understanding*, paid the defendant, *for said Rachel*, $200 in gold coin, for which he gave the following acknowledgment in writing: "Received of B. Dove two hundred dollars, to be applied on purchase of land, purchased by me at sheriff's sale; the land known as Mrs. Dove's half of donation land claim. July 26, 1864. (Signed) B. Hayden." (Record transcript, page 26.)

That $200 was paid on July 26, 1864, by Bethuel Dove to Hayden, and that the above receipt was given by Hayden to Dove is admitted, but that said $200 was so paid by Bethuel Dove *for said Rachel*, or *in pursuance* of any such *understanding*, had, *prior* to the date of the sheriff's sale, as alleged, is denied, and the testimony will not support any such finding.

Hayden denies emphatically that said $200 was received on any *prior understanding*. He asserts, on the contrary,

that some *four months and over, after he had purchased the land in question* and paid his money for it, borrowing on his own account for such purpose $650 of the amount from one J. B. Butler—and *a short time before* the 26th of July 1864—he made a *verbal contract* with *Bethuel* Dove, not *Rachel*, whereby he agreed with Dove that if he would pay him the amount of the purchase money, $1250, with interest, within a year's time, $650 dollars of which—the amount Hayden was owing Butler—to be paid *at once*, or *soon*, that he, Hayden, would upon such payments sell the land to him, Bethuel Dove. (Transcript, pages 96, 97.) That *in pursuance* of this *verbal agreement* made, over *four months after* such sheriff's sale, and *not* in pursuance of any "understanding" or "agreement" had *before* or *at* the sale; and a short time after it was made, Dove paid this $200, and for which Hayden gave the receipt in question. (Transcript, page 97.)

Hayden further testifies on this point, after detailing this verbal agreement, as follows: "Mr. Dove paid me $200, and told me at the time that if he was not able to pay it all or any more the rent of the place for two years would be worth $200 to him. He was living on the place at the time. He never paid me any more towards the purchase of the place. Before this $200 was paid me, I think I had some conversation with Mrs. Dove. I was passing by and called to see Mr. Dove. I thought he was slow in making any payment on the $650 which was to be paid down. I told Mrs. Dove that I had that money to raise, and if Mr. Dove couldn't pay it I would have to borrow it. That is all the conversation that I recollect having with Mrs. Dove. I did not in that conversation say to Mrs. Dove that the place had been hers, and it should be hers again, or that all I wanted was to get my money back, or that I would fix it so no one could get it away from her again, nor anything of the sort. *I never at any time had any conversation with Mrs. Dove in which I promised to let her have the land back, or to secure it for her or to purchase it for her at the sale.*" (Tran. p. 97.)

In this connection, let it not be forgotten that Bethuel Dove, in his testimony, nowhere denies *in terms*, nor at all except by the *remotest inference* the statement of Hayden that these $200 were paid in pursuance of a verbal agreement made *after* the sheriff's sale; nor does he *pretend* in his testimony that he paid this money — as found by the court below—"*for said Rachel*," or on any other than his *own account*, as claimed by Hayden. The only part of Hayden's testimony in this regard—that Bethuel Dove denies—is the statement that in case he was unable to pay the balance of the purchase money, the $200 were to apply on the rent of the place.

That there may be no misunderstanding as to his testimony in regard to this transaction, the *whole* of what he said in regard to it is here quoted. This testimony, it is true, was given before Hayden's, but Bethuel Dove was called to the stand a *second time*, after Hayden had given his testimony, but he made no reference whatever to Hayden's testimony on this point, *much less did he contradict it.* Bethuel Dove's only reference to the payment of these $200, or the circumstances under which they were paid, is contained in the following words:

"I had conversation with him about that $200 when I took it up to him; I took him up $200 in gold coin, and gave it to him in payment on the place, to pay his money back, and he gave me a receipt, and at the same time he talked about letting us have some sheep to keep on shares—to keep on the place now in dispute." (Tran. p, 67.)

He testifies further, to the effect that he then, after the payment of this $200, rented the place to a Mr. Smith, who was to give him one-third of what he raised on the place. He says:

"He (Smith) was to loan me money to finish paying Hayden up; I was to pay him (Hayden) 10 per cent. interest, and he was to keep his place until he got his money back. I think there was then due Mr. Hayden on the purchase about $700 in gold coin." (Tran. p. 62.) * * *

"About that time, when I paid him the $200, he looked over and said, he had borrowed some of the money from Butler, in greenbacks, and he had to pay him more than four bits on the dollar; I think he said there was about $700 due him on the place; that he lacked about that much of having his money back, after getting the $200." (Tran. p. 63.)

On cross-examination he said:

"I think the $200 was paid Hayden in 1864; I think his wife and family were present when the money was paid; I mean by his family, his wife and children; nothing was said at that time about applying this $200 towards the rent in case we couldn't raise the balance of the money." * *
"I don't know whether I can produce that $200 receipt; I think that receipt reads about in this way:
"Received of B. Dove $200, to be applied on the place purchased by me at sheriff's sale, known as Rachel Dove's donation land claim, and signed, Benjamin F. Hayden." (Tran. p. 67.)

This constitutes the whole of Bethuel Dove's testimony in reference to this transaction. The plaintiff ~~are~~ given the full benefit of it, and no legitimate deduction can be made from it inconsistent with the fact that the $200 was paid in pursuance of an agreement made *after* the sheriff's sale, as testified to by Hayden, and not in pursuance of an understanding had *prior* to the sale as found, erroneously, as it is respectfully submitted, by the court below. And the only testimony which in any way controverts Hayden's statement in respect of this matter, is that of Rachel Dove and her daughter, Mrs. Manning, wife of the plaintiff, and some reference made by the witness Lawson, one of plaintiff's attorneys, as to an alleged admission of Hayden that "*he had offered* her" (Mrs. Dove) "some sheep once, to pay her back the $200 in gold that she paid on it to redeem it." (Tran. pp. 43, 58, 70.)

Nor is the statement of Rachel Dove (Trans. record page 58) necessarily inconsistent with Hayden's testimony to the effect that these $200 were paid in pursuance of an arrange-

ment made *after* the sheriff's sale, and not in pursuance of an "understanding and agreement" had *before* the sale. She says:

"Then, after it was sold awhile, I don't know how long after, he came down to get some money; came to our house. He said he needed some. I told him I would send him up some the next day when Mr. Dove came home. Mr. Dove took it up next day, and he got a receipt for it. It was paid towards the place, getting it back." (Transcript, p. 58.)

This is all Mrs. Dove says in reference to this transaction. She does not, as it will be seen, say that this money was paid in "pursuance of any understanding or agreement" made *before* the sheriff's sale. Hayden admits that he called at the Dove residence for money; that he thought Dove was slow in making any payment on the $650 that were to be paid soon after this verbal agreement was made; that he saw Mrs. Dove and told her he had this money to raise to pay Butler, and if Mrs. Dove could not pay it he would have to borrow it. Mrs. Dove's testimony, therefore, when carefully analyzed, so far from contradicting Hayden's statements, is entirely consistent with them upon the main question, that this money was paid in pursuance of an agreement made with Dove *after* the sale, whereby Hayden permitted him, on easy terms, to purchase back the land.

But the Court below, ignoring *absolutely* all *reference to* or *discussion of*, any of the testimony bearing upon this particular transaction, save and except the receipt for the $200, the proper construction of which *is discussed at length*, makes, in view of the testimony just quoted, and of all the circumstances of the case, the following very remarkable statement in the very elaborate opinion filed.

"The defendant *pretends*" (not claims) "that the agreement to redeem was made *at* the date of the receipt, and not *before*" (and by the way the defendant makes no such *pretense*—or *claim*—because he swears positively the verbal agreement permitting Dove to purchase the land was made *before*

the payment of the money, and *before the date of the receipt* and not *at* its date, but *after* the sheriff's sale), "and he did not believe at the time that the Doves would be able to perform it; and, therefore, he made the further conditions that if the redemption was not completed within a year from the date, that is, by March 5th next following, the agreement should be at an end, and the $200 then paid on it be retained by him as rent of the premises for such year." "*But with this statement*," says the Court further, "*the known and undisputed facts of the case are at variance.*"

Upon what theory the Court below could, in view of the positive statements of Hayden, the failure of the Doves to controvert except in an inferential manner, and the other *conflicting* evidence in the case, arrive at the conclusion that Hayden's claim in this regard is at variance with the "*known*" and "*undisputed facts of the case*" is to say the least, difficult of comprehension,

But the Court proceeding says, "*The receipt itself is directly opposed to it*," and further, "*but the language actually used in the writing is also contradictory of the defendant's statement*;" and the Court proceeds with what seems a labored argument to prove that a fair construction of this receipt shows a direct contradiction of Hayden's theory. The Court says:

"The receipt is not simply for $200 received by the defendant on account of land then sold the Doves, or then purchased back by them from him. On the contrary, it is in terms and effect for $200 to be applied on purchase of Mrs. Dove's land, *theretofore* purchased by the defendant at sheriff's sale." "To be applied on what purchase? Why, manifestly, the purchase made at the sheriff's sale, thus suggesting distinctly what the Doves assert, that the land, though purchased at such sale by the defendant in his own name, was in fact, purchased for them, and was in equity and good conscience their purchase. Upon no other theory of the facts can effect be given to this word "purchase" in the receipt or its use therein satisfactorily accounted for." (Transcript p. 31.)

It is submitted in all candor and entire confidence this criticism upon the part of the court below, is hypercritical. As an argument, coming from the court it is entitled to, and shall receive our respectful consideration; it would, however, had it been made by the attorneys of the Doves, have been unworthy them in their capacity as lawyers of learning and ability. The truth is while the receipt can throw but little light on this case, except as evidence of the fact that Bethuel Dove, and *not* Rachel, paid Hayden $200 on this land July 26, 1864, yet a proper construction of the same, leads to a wholly and directly opposite conclusion from that reached by the court below. The receipt in question is in words and figures as follows:

"Received of B. Dove two hundred dollars to be applied on *purchase* of land *purchased* by me at sheriff's sale. The land known as Mrs. Dove's half of Donaton land claim. Signed B. Hayden."

See *original* receipt sent up in this case; what *purports* to be a true copy in Transcript page 116, is *not* a true copy; a correct copy is given in the opinion of the court below. (Tran. p. 26.)

The court argues that because the words "*purchase of*" are used in this receipt instead of simply saying "to be applied on land *purchased by me at sheriff's sale*," that, therefore reference is made, and was intended to be made, to the fact that this $200 were to be applied, *not* on a purchase of this land made by Dove from Hayden, but on the purchase made by Hayden at sheriff's sale.

Suppose the receipt had read "to be applied on land purchased by me at sheriff's sale," omitting the words "*purchase of*" would not the conclusion be *irresistible* that the *purchase* to which the money was to be applied in that case was the purchase of Hayden at the sheriff's sale. And in such a case the court might well have argued that such was the proper construction. But the insertion of the words "*purchase of*" before the words "land *purchased*

by me at sheriff's sale" manifestly changes the construction and requires the application of the money to *another* purchase than that of Hayden at the sheriff's sale; that is to say on *a purchase by Dove of Hayden*, of lands, theretofore *purchased by Hayden at sheriff's sale*. The sole purpose or necessity of using the words "*purchase of*" causing it to read: "to be applied on *purchase of* land *purchased by me* at sheriff's sale," instead of "*to be applied on land purchased by me at sheriff's sale*," was to designate which *one* of *two* purchases the money was to be applied to. If there was but *one* purchase as contended by the court, to wit: the *purchase of the Doves* at sheriff's sale, through and by their agent and attorney, Hayden, (Tran. Record p. 31) then there was no necessity for saying aught else, except that the $200 were "*to be applied on land purchased by me at sheriff's sale*," but as conclusive evidence that there was *another* a *subsequent*, *second purchase*, to wit: a *a purchase by Bethuel Dove from Hayden* of this same land that Hayden had before purchased at sheriff's sale, and that this money was to be applied to the *former* and not the *latter*, it became necessary to employ the additional words: "*purchase of*" causing it to read "to be applied *on purchase* of land purchased by me at sheriff's sale" The word "*purchase*" unquestionably refers to the purchase of *Dove from Hayden* and not as contended by the court below, to the purchase by Hayden at sheriff's sale, while the word "*purchased*" as used in the receipt refers to the purchase by Hayden at the sheriff's sale. That this is the plain undoubted construction of the language used in this receipt, is manifest without further suggestion or argument.

At most, moreover, may it not be properly suggested, is not the extended argument of the learned Court below, in reference to the wording of this receipt, giving to it a prominence in this case it does not deserve, a rather feeble structure upon which to base a conclusion *in equity*, the effect of which is to not only strike down a *record title of over fourteen years standing*, but to brand an otherwise respected

pioneer and citizen, and worthy member of the bar, as a remorseless invader of the property rights of his neighbors and clients?

It seems this original receipt was at the time the deposisitions of Hayden and Dove were taken in this case, mislaid or lost, and the Court below, because Hayden could not, in giving his testimony *fourteen years* after the receipt was written, give the *exact language* employed in it, uses the fact as an argument against him. (See opinion of Court, Tran. p. 31.) But the Court failed to note the fact that Bethuel Dove, in giving *his* recollection of the exact wording of the receipt, was as far wrong as was Hayden, and that although neither gave it precisely as it is, each gave almost identically the same wording. Hayden said (See his testimony, Tran. p. 100):

"It is a number of years since I saw it; after the day and date, July, 1864, as I recollect, it ran in this wise:

"'Received of Bethuel Dove, two hundred dollars, to be applied upon the land purchased by me at sheriff's sale.'

"That is, I think, substantially the wording of the receipt; it is, perhaps, ten years since I saw it; it was signed by me, of course." (Tran. p. 100.)

While Bethuel Dove gave his recollection as follows:

"I think that receipt reads about in this:

"'Received of B. Dove, $200, to be applied on the place purchased by me at sheriff's sale, known as Rachel Dove's Donation land claim,' and signed Benjamin F. Hayden." (Tran. p. 67.)

Reference is made to this aspect of the case more than aught else for the purpose of attracting the attention of the Court to the great importance which the Court below attached to these *minor*, and in most respects *immaterial*, matters, and to the end that the opinion of the Judge of the Circuit Court may be read by aid of the calcium light reflected from a *fair* and *full presentation* of the testimony in the case, and its real merits thus properly tested.

WAS HAYDEN RACHEL DOVE'S ATTORNEY AT THE TIME OF THE SHERIFF'S SALES.

But the Court erred in finding (Opinion, Tran. p. 26) as a conclusion of fact, "That at the date of such sale the defendant was the attorney of said Bethuel and Rachel Dove in said matter."

What are the facts? The defendant it is admitted had, as the attorney of Bethuel Dove, attended to some business for him, years before the suit to foreclose Mrs. Dove's interest in the land was brought, the principal retainer being as associate with attorneys Logan and Shiel in the case of Griswold vs. Bethuel Dove, in 1857 and 1858, about two years prior to the execution of the mortgage by Mrs. Dove, and more than *five* years before the suit, decree and sale on the Rachel Dove mortgage. Hayden in his answer, (Tran. p. 12) denies that he was ever at any time the attorney or confidential adviser of Rachel Dove, or that he ever was in any way whatever consulted, professionally or otherwise, by said Rachel Dove as to her separate or general business, or specially as to the effect of said mortgage upon her separate property, and "*that he never at any time bore to her the relation of attorney or confidential adviser in divers or any business whatever.*" He admits, however, that "he had before that time done some general business for the said Bethuel Dove, and had done and performed for him services, professional and otherwise, but was not consulted by him as to borrowing the said $1,500, or the making of said mortgage." While in his testimony (Tran. p. 98) he says:

"I acted as attorney for Mr. Dove, in conjunction with Logan and Shiel, in the case of Griswold *vs.* Dove, in 1857 and 1858. I had, prior to that time, several years before, drawn up a deed for Davis to Dove for land; also a mortgage on the same land at the same time from Dove to Davis to secure the unpaid part of the purchase money. I don't know of any other business I ever transacted for Mr. Dove that would require the services of a lawyer. In that suit of

Griswold *vs.* Dove, Logan and Shiel performed the principal part of services as counsel."

Previous to the foregoing statement, however, Mr. Hayden, in explanation of how and for what purpose he came to file the demurrer in the foreclosure suit, said:

"I was spoken to by Mr. Dove in regard to the foreclosure suit, and the defense in the matter. Mr. Dove was of the opinion that the manner in which the mortgage was signed would invalidate it. I told him I thought not. He then said *he had no defense to the merits of it*, and *if he could gain time in any way* he would like to have me do it for him. I told him that I did not think the law clear as to the right of the county treasurer to bring suit; that we could test that by demurrer, and if it was sustained by the Court the case would necessarily go over until the next term; and at his request I filed a demurrer for that purpose. I had no conversation whatever with Mrs. Dove in regard to appearing for her in that foreclosure suit, either before or after the foreclosure, that I recollect of. *I never, at any time, did any business for Rachel Dove as her attorney, unless filing of that demurrer might be considered as done in her behalf.*"

Bethuel Dove's testimony, while he claimed in a general hap-hazard way that Hayden was his attorney *generally*, so far as his statement of *actual facts* is concerned it does not differ materially from that stated by Hayden.

"He attended to all my business — he was my attorney. He attended to a big suit I had with Griswold, and I believe *that was the only lawsuit he attended to*; but he attended to other business, settling up book accounts," &c. (Transcript, page 62.)

In refering to the foreclosure suit, he says:

"* * * He answered that by demurrer; the demurrer was overruled; judgment went against us. * * * I don't know as I ever paid him anything for attending to the case. He never made out any bill against me or my wife for services in that case." (Transcript, pp. 62–64.)

While Rachel Dove, in her testimony, claims that Hayden wrote the mortgage she signed, and claims in a general way that Hayden was the general attorney and adviser of both husband and herself, is compelled to state, when closely questioned, on cross-examination, that he never had done any business for *her* except to write that mortgage, (and it has been clearly shown he did *not* write it, but that Boothby did,) or for Mr. Dove for that matter, except *to do the writing in his suit with Griswold.*" (Transcript, p. 60.)

The testimony, therefore, fails to show that continued confidential relation of attorney and confidential adviser of either Mr. or Mrs. Dove, running through a series of years, as indicated in the findings of the court below, in the following language:

"That for some time prior to 1858 and up to 1865, the defendant was the *general attorney* and *trusted adviser* of Bethuel Dove *and his wife.*" (Transcript, p. 25.)

Thus for a period of eight years he was, according to this finding of the court, the "*general attorney and trusted adviser*," not only of *Bethuel* but of *Rachel Dove*; and yet the *only* business done by him for Bethuel Dove *during all these years*, according to *Dove's testimony* that he is able to *specify*, is the services in the Griswold case, in 1857 and 1858, settling up some book accounts, and filing the demurrer in the foreclosure suit; while there is *not a particle of testimony* that he ever at any time *in all these years* did any business whatever for *Mrs. Dove or in her interest*, except to write this mortgage, as falsely claimed by her, advise her in reference to it, and file the demurrer in the foreclosure suit.

There is not a word of testimony from *any source* tending even to the conclusion that from the date of the execution of that mortgage March 2, 1859, to the date of the filing of the demurrer in the foreclosure suit in the fall of 1863, a period of nearly *five years* carved out of the *eight* years, referred to by the court, Hayden had done any business whatever for

either Bethuel or Rachel Dove, or given them any advice whatever, or been consulted by them, or either of them, in reference to any matter or thing whatsoever, either as attorney, trusted adviser, or friend.

That Hayden was engaged by Bethuel Dove to appear in the foreclosure suit against Dove and wife for a *certain specific purpose* there is no doubt but it was only for a *certain specific purpose* to-wit: *to procure time.* This is clearly evident from all the facts in the case. There was no defence to the suit on the merits, nor was there any technical objection that could be made available; and the engagement of Hayden was for the sole purpose of putting in a demurrer, in which it was well known in advance, there was no merit, and for the sole purpose of postponing over a term the decree in the case. When this demurrer was filed, overruled as it was expected it would be, and all the time gained which it was by such a course possible to gain, *the engagement of Hayden was at an end.* When Hayden told Dove there was nothing in the point suggested by Dove in regard to the manner in which the mortgage was signed, Hayden testifies, and Dove does not deny it, as follows:

"He then said he had no defence to the merits of it, and if he could gain any time in any way he would like to have me do it for him." (Transcript, page 95.)

But it is argued by the court below (Transcript, page 35), that Hayden having appeared in the case and filed this demurrer, *continued* to be the *attorney counsellor, and adviser* of the Doves until *after confirmation of the sheriff's sale by the court;* and as a reason cites Sec. 1010, civil code of Oregon, and insists that because Hayden was not "changed" in accordance with its provisions he still continued to be the attorney of the Doves. It is respectfully suggested that the court below misapplied this section of the statute.

The section reads as follows:

"An attorney in an action, suit or proceeding may be changed at any time before judgment, or decree, or final determination as follows:

1. Upon his own consent filed with the clerk, or entered upon the journal.
2. Upon the order of the Court or Judge thereof, on the application of the client, or the attorney for sufficient cause.

Sec. 1011. When an attorney is changed as prescribed in the last section written notice of the change and of the substitute of a new attorney, or the appearance of the party in person shall be given to the adverse party; until then, he is bound to recognize the former attorney."

It will be observed that by the first clause of Section 1010, Civil Code Oregon supra, there are *three* classes of cases in which an attorney may be changed as prescribed in that section, to-wit:

"Actions," "suits" and "proceedings." These are each recognized by the Oregon code as by most other codes, as a separate and distinct class; *actions at law*; *suits in equity*; and *special proceedings*, such as Habeas Corpus, &c., &c. An attorney then, may, under this section, be changed in each of these three classes of cases, when? Clearly in an "*action*," at any time before "*judgment*" in a "*suit*" any time before "*decree*." And in a "*proceeding*" at any time before "*final determination.*"

If it had been the intention of the person who wrote the code, or of the Legislature which breathed into it the breath of life to make this mode of changing an attorney applicable to all three classes, "actions," "suits," and "proceedings" as well *after* judgment and decree as before, then the section would unquestionably have been made to read as follows:

"An attorney in an action, suit or proceeding, may be changed at any time before final determination as follows": and the words "*judgment or decree or*" would have been omitted. As they were inserted however, it is manifest the words "*final determination*" must be held to refer solely to

"*proceedings*" and not to "*actions*" or "*suits*" and therefore this section was only intended to apply to actions and suits at any time before a "*judgment*" in case of an action at law or before a "*decree*" in a suit in equity, and can have no application whatever to any action after *final judgment* or to any suit *after decree*. The rendition of final decree therefore in any suit is, as between the client and his attorney, the end of the relation, except he may have certain rights if he desires to assert them until he receives his fees, but he is *bound* to proceed no further as attorney, in any suit than *final decree*, unless such continuance is *specially* stipulated for, either in advance of, or subsequent to the decree. In this case nothing of the kind appears.

It is *not* "*insisted*" therefore upon the part of Mr. Hayden as asserted by the court below, (Tran. p. 35) "*that in some undefined and occult way the defendant dropped out of the case before the sale, and was therefore a stranger to the proceeding.*" Upon the contrary, he went out of the case, as any honorable attorney should have done, because *he had performed his engagement*, the suit had come to an end by a final decree of the court, and he was not requested or retained by the defendant in that suit, to represent them further.

In Deviney *vs.* Norris, 8 Watts 315, *Supra*, the court below instructed the jury that the fact that Laird was the attorney of the defendants in the action in which judgment was rendered, *did not preclude him from becoming a purchaser at a sheriff's sale on execution issued on this judgment.*

This view of the law was affirmed by the Supreme Court of the State of Pennsylvania. That court, in its opinion, said :

"Two objections are chiefly relied on by the plaintiffs in error to the charge of the Court.

"First. It is alleged that Laird's title was bad *because he was the attorney of Devinney in the suit against him on which the judgment was recovered*, and also, as was alleged,

attended as such before the jury at the condemnation of this land, and therefore he could not legally become a purchaser of the defendant's title at sheriff's sale, or if he did was trustee for the defendant. The suit *related entirely to money* and had *nothing to do with the land*. The attendance of the attorney before the inquisition must have been either to prevent a condemnation, or to see that the land was properly condemned. *But in relation to the sale, Laird was not employed, nor had he any connection with, nor control over, it. There is nothing in the simple circumstance of his having previously been the defendant's attorney in the suit that would prevent his becoming a bidder, when there is no evidence of any undue step taken by the defendant. On the contrary, his becoming an additional bidder was rather a benefit to the defendant.*"

This opinion, it will be seen, recognizes the rule first, that in an action or suit the relation of attorney for defendant *ceases on the final judgment or decree*; and second, That the simple circumstance that a person has been the attorney of a defendant in an action or suit "*relating entirely to money*," *prior* to judgment or decree, does not prevent him from becoming a purchaser at sheriff's sale of the defendant's property under such judgment or decree, provided "he takes no undue step to the prejudice of the defendant."

The books, moreover, recognize a wide difference between the cases of one who is at the time an attorney, and purchases at a judgment or other sale the land of his client, when the suit or action in which he is attorney relates to a *money demand* simply, and when the purchase is of *the thing in controversy* in the action or suit in which he is the attorney.

"The purchase by an attorney of an interest *in the thing in controversy* in opposition to the title of his client, is forbidden because it places him under temptation to be unfaithful to his trust. Such a purchase, therefore, may inure to the benefit of the client."—(Weeks on Attorneys-at-Law, Sec. 277.)

This authority, however, after stating the general rule that "an attorney is not permitted to purchase the *subject matter* of the litigation he is managing for his client," says:

"This is the general rule, subject to the qualification that an attorney *may purchase* of his client, if he can show conclusively to support his purchase that he paid the full amount he could have obtained from any other person." * * * The courts do *not* hold that an attorney is absolutely incapable of purchasing from his client, but watch such a transaction with jealousy, and throw on the attorney the burden of proving that the bargain is, generally speaking, *as good as any that could have been obtained by due diligence from any other purchaser.*"

In the case at bar Hayden purchased at *public auction* to the highest bidder, after the property had been offered for sale on *three* different occasions, and there is not a particle of testimony connecting Hayden with any effort directly or indirectly, to induce bidders not to bid, or to prevent any one from attending the sale, or to depreciate the value of the property either before or at the sale.

Again, another rule has, as hereinbefore suggested, been recognized as applicable to this class of cases, as follows:

"Nor will the rule which throws upon a solicitor dealing with his client the burden of proving the fairness of the transaction, apply with the same force where the relation, *though not terminated*, has been *loosened* and the influence consequent on the relation which formerly existed between the parties is not subsisting in its full and perfect force."

Kerr on Frauds, 167, 168.

In this case, even were the law as contended for by the court below as to the the technical continuance of the relation until after confirmation of sheriff's sale, it is evident from the testimony that neither Hayden nor the Doves supposed *at the time* that Hayden was the attorney in the case *further* than for the purposes of filing a demurrer with a view of procuring time. So that, conceding the relation had not technically "terminated," it had, to say the least, been very materially "*loosened*" and the "influence consequent on the relation formerly existing between the parties" was "not subsisting in its full and perfect force."

INADEQUACY OF CONSIDERATION.

But a further contention of the Circuit Court is, that "the inadequacy of the consideration advanced by the defendant was very marked, it being at most a little over one-third its real value." An inadequacy, remarks the Court, in the language of the books, "so gross and manifest as to shock the conscience. (See opinion of Court below.) Tran. p. 32.)

Was the Court below justified in this conclusion? It is respectfully submitted it was not.

And attention is called to the fact that the Court, in the opening remark of the argument on this point, says:

"As to the value of the property in 1864, the testimony is very conflicting, the opinions varying from $700 to $4,000 in coin." (Hayden paid $1,225 in currency.)

This is true. The testimony as to the value in 1864 "is very conflicting," and it may be said with equal truth that the testimony of the *witnesses for the plaintiff* is "very conflicting." It is fair to state, however, that a fair average of the *opinions of witnesses for the plaintiff* on this point would place the value of the land at the date of the purchase by Hayden at from $2,000 to $3,000. But when we come to look at the *grounds* for such opinions, and at the *evidence on the part of the defendant*, the case is presented in a very different light. Attention is called to some of the statements of witnesses.

Harrison Linville says, that he lives in the neighborhood of this land. Further:

"I would think that land would have been worth from $4 to $6 per acre in 1864. I don't know as I can answer the question any more specifically than that. I have lived in Polk County some thirty years; I bought and sold land in that county between 1860 and 1865." (Tran. p. 74.)

James Jones testified as follows:

"Age, 54; reside in Polk County; I have known Mrs. Dove's land since 1863; I wasn't made acquainted with the value of land in 1864, only in my own dealings; I sold 160 acres for $500, and bought 160 acres for $500; the land I bought joined the Rachel Dove claim; I bought it in 1863; There was an orchard on the land; the improvements were about equal to ths improvements on Rachel Dove's land in 1864. The 160 acres of mine, taking all things into consideration, was just about equal in value to Rachel Dove's half of Donation claim, in 1864; I mean per acre." (Tran. p. 75.)

Hear what the sheriff who sold the land says:

Isaac N. Butler testifies--

"Age 46; live in Polk County, Oregon; have lived there about 25 years; was sheriff of county in 1864; * * * I sold this land in 1864, while I was in office; I sold a good many pieces of land about that time.

Q. State whether at that time the price this land brought bore the same proportion to its value that the price of other lands sold by you as sheriff bore to their values at that time?

"A. *I think it did. All the lands I sold about there sold remarkably low. The improvements then were very different from what they are now on the Rachel Dove land.* The fences were down almost all over the place; in fact there was very little fence then. The house was very much out of repair, and dilapidated."

On cross-examination this witness said:

"The fences in 1864 were down, there were but few rails there; stock was going in and out. * * I think in 1864 greenbacks were worth about 70 or 75 cents; I couldn't say whether they were as low as fifty in that year.

Q. If greenbacks were worth 50 cents on the dollar, was the $612,50 anything like the fair value of those premises, so sold--considering the improvements and all--at sheriff's sale?

"A. I think it was not the real value of the land, but at the same time it was about on an equality with other lands that I sold about the same time."

On re-direct he said:

"The greenbacks were not discounted any in entering satisfaction of that judgment, but entered dollar for dollar." (Tran. p. 79.)

J. B. V. Butler sworn, says:

"I am acquainted with Bethuel and Rachel Dove's Donation land claim. I owned one-half of it. The north half. I purchased it at Sheriff's sale, I think in January 1859. *I paid two dollars per acre.* I considered the north half the best half at that time, better than the south half. I owned it several years. I think three or four years, may, be longer. I think I sold it for $2,000 at private sale, part down, and part on time. I shouldn't think $1,250 was a fair price for Mrs. Dove's land in 1864. I didn't want the land. I knew of the sale."

On cross examination:

"If I had owned the south half of that claim in 1864. I don't think I would have valued it at $10 per acre. I would have taken less than $2 per acre. I was merchandizing then, did not want land." (Transcript, page 80.)

A. H. Simpson sworn:

"I knew the land in question. I was acquainted with the land in controversy—with the improvements on it 1864.

Q. Considering the land and the improvements, state whether you think $1,250 was anywhere near a fair valuation of it at that time?

A. *I think there were other lands equally as good that sold that cheap, both at public and private sale. I remember some land that sold at private sale that sold that cheap.*

Q. State what in your opinion was a fair price for the land in controversy, considering the improvements, at cash sale in 1864.

A. *It is my opinion considering the way other lands rated that $1,250 would have been a fair sale—a fair value. I am a farmer by occupation.* * * * The improvements that have been put on the place since 1864, if the whole fence be-

longs to the place, *is at least $1,200 or $1.500. * * * There was no barn on the place in 1864. There was an old shed or frame of a barn rotted down. I wouldn't consider it worth anything.* (Transcript, p. 83.)

S. C. Dice testifies.

"In fall of 1863, or winter of 1864, I bought 22 acres on Island near where I lived. It was prime bottom land, overflowed land. All the bottom land on the Rachel Dove claim is subject to overflow. *I bought this 22 acres at private sale. I paid $4.00 an acre. I would consider that bottom land about equal in value with the Rachel Dove bottom land.*

There was a piece of land east of me that Wm. Jones bought about that time. I think it was forty acres. It was bottom land. I think it sold for $4.00 an acre. There were no improvements on it. *There was a half section sold about near that time, right north of me. Mr. Hayden bought it of John T. Davis at private sale. He paid $500 for the half-section. * *

This don't touch the Dove land; *it may corner with it on the northwest corner.* (Transcript, p. 88.)

R. A. Ray, a witness, says:

"I was a very little acquainted with the value of land there in 1864. *Land was pretty low. It went up, then down again. In 1862 to 1864 it was very low.* After the freshets in 1862 lands on the bottom particularly depeciated." (Transcript, page 88.)

R. Doty testifies as follows:

"I live in Polk County, am acquainted with the Rachel Dove Donation land claim. Have known it since 1862. Such lands as Rachel Dove's with the improvements, in 1864 I dont believe could have been sold at over five dollars an acre. At forced sale it would not have brought that much. * * * *Considering its condition and improvements and the price of land in 1864, I would say that this land might at forced sale, have gone as low as five or six hundred dollars.*"

This witness estimates the improvements put on the place by Hayden in getting the land in cultivation and building fences at $1,000. (Transcript, pp. 88, 89.)

B. S. White sworn says, on this point:

"I know the land in controversy in this suit. I first knew it in 1866. *The improvements were poor. The fences are much better now than they were then*, and the barn is better. There is more land in cultivation than there was then. I have had something to do with the fencing, I assisted my brother in hauling and putting up rails on the place—new rails. I cant state how many, between four and five thousand. * * * In the spring of 1866 my father was offered a quarter section in what I consider a better location, with improvements about equal to the improvements on the Dove land, and soil about the same, at seven hundred dollars."

"This place was north-west from the Dove place, about four miles further from market." (Transcript, page 89, 90.)

T. M. Dice says:

"Reside in Polk County. Have resided there most of the time since I was born. Am 28 years old. I know the Rachel Dove Donation land claim, Including ploughing and fencing to the best of my knowledge there are $800 or $1,000 worth more of improvements now on the place than there was when I first remember the place after 1864. There have been a good many new rails put on the place.

I know of land equally as good without improvements selling about 1864. My father bought a piece on the river bottom at four dollars an acre; 22 acres to the best of my knowledge as good as any of the Rachel Dove land. Taking into consideration the value of land then, that land with the improvements was worth in 1864 at cash sale, to the best of my knowledge, from one-third to one-half of its present value. (Transcript, page 93.)

But in addition to all this we have the sworn and *uncontradicted* statements of Hayden in his testimony not to mere *opinion* or *estimates*, but the following *facts* which plaintiff has not even *attempted to controvert* by any counter testimony.

Hayden says:

"I owned considerable land, some adjoiniug Mr. Dove's claim and some in that immediate neighborhood, at the time I bought the Dove land. About that time, perhaps in 1864 or 1865, I purchased of John Davis 320 acres of land that adjoined this land in question. It was what was called prairie land, with some brush; perhaps 200 acres of it could have been ploughed without any clearing being done. *I paid for the Davis land $500—$275 of it in horses, the residue in money, at private sale.* I purchased of a man by the name of Taylor, bottom land, mostly timber, about two miles from the Dove place, along in 1867 or 1868, *168 acres of land, for which I paid $300 at private sale.*

About the same time I purchased of Mr. Ladd, I believe, *160 acres of land lying near the Dove place, nearer Salem, at private sale for $500*, that was bottom timber land, no open land on it. *About in 1864 or 1865 I purchased at sheriff's sale, near Monmouth, 311 acres for $500.*

In 1869 I purchased at private sale the Donation land claim of Mrs. Fudge, adjoining the land in controversy, lying south, *320 acres for $2000, part cash and part on time.* That donation claim was a portion prairie and a portion bottom and island land, similar to the bottom and island land on the parcel in dispute. The fencing was mostly new, and tolerably good. There was a substantial dwelling of red cedar, a large kitchen, portico the full length of the house latticed in at either end, three rooms below besides the kitchen, all well finished and ceiled inside with red cedar, except overhead up stairs. Upstairs was not partitioned off into separate rooms. There was a large, well-finished, new barn on the place. I dont know how many acres were under fence; perhaps 100 acres. may be more.

In 1865 I purchased University land at public auction, near this place. at two dollars per acre; all timbered land.

In 1859 or 1860 I purchased land adjoining this in controversy at Sheriff's sale, a portion of it under substantial fencing at a trifle over a dollar an acre. *I gave a hundred dollars for* 87½. (Transcript, p. 102.)

On cross examination as to this evidence Mr. Hayden answered as follows:

"I can't say whether there was a dispute about that Davis land, or title to it, that lowered the price of it. I will state that Mr. Davis told me that Sullivan and Whitson didn't

think he had anything but a life interest in a portion of it. That is all I know of any dispute in regard to title. I never heard of any dispute or talk about the title to the Fudge claim. I got the patent when I bought it and a warranty deed. * * * Those island and bottom lands I spoke of are subject to overflow, and so all the best tillable land in the land in controversy, is subject to overflow. Those bottom lands I spoke of buying were all improved, except this 87½ acres I speak of; a portion of that 87½ acres was improved. * * * I dont mean to say that all the bottom land on the Fudge place was unimproved. The best part of it was improved when I bought it. (Transcript, page 103.)

Every one of these statements relating as they did mostly to matters of public record, were susceptible of contradiction, had they been untrue. And what, taking them to be true as they must be in the absence of any *assertion* even to the contrary,—do they present? Simply this: that during ing the years 1864 to 1869, and mainly in 1864 and 1865, Mr. Hayden purchased in the immediate neighborhood of the lands in controversy, partly adjoining them, and equally good in character, with better improvements in the main, 1366½ *acres of land*, 397½ *of this at sheriff's sale, the other* 969 *acres at private sale for the sum of* $3,900, *or for an average of* $2.85 *per acre, besides having purchased University lands, how many acres are not stated, at* $2.00 *per acre.*

And yet, when he pays for the lands in controversy at a sheriff's sale, to the highest bidder, after two postponements for want of bidders, $1,225 for 320 acres, or nearly $4 per acre; or one-third more than he had paid, on an average, and mostly at private sale, for 1,366 acres of equally good land and with better average improvements in the same neighborhood, and about the same time, the court below responds with the assertion that the consideration paid is but a little "over *one-third* its real value;" and that the "inadequacy is 'so gross and manifest as to shock the conscience.'"

In view of the testimony, and especially of the uncontra-

dicted testimony as to these *actual sales* it may not be inappropriate to suggest, and the interests of our client seem to require it, that the "*conclusions*" reached by the court below upon this, as upon some other phases of this controversy, rather than the "*inadequacy of considerrtion*," are of a nature to tend at least "*to shock the conscience.*"

SUMMARY.

From the views submitted it follows:

1. There was no *understanding* or *agreement*, express or implied, had between Hayden and the Doves, or between him and either of the Doves, *prior* to the sheriff's sale, to the effect that he (Hayden) should bid in the premises for them or either of them, or for their benefit; and such purchase by Hayden was not made in pursuance of any such *prior* understanding or agreement, either express or implied.

2. That Hayden was *not*, at the date of such purchase at said sheriff's sale, the attorney or confidential adviser of either Bethuel or Rachel Dove in reference to such sale, or any of the proceedings connected therewith, nor in reference to any other matter or thing; nor had he been the attorney or confidential adviser of either of the Doves in reference to *any matter whatever*, at any time subsequent to the date of the rendition of the decree against Rachel Dove and Bethuel Dove in the foreclosure suit.

3. That there was a verbal understanding and agreement had between Hayden and *Bethuel* Dove some *three* months *after* such sheriff's sale, whereby Hayden gave Bethuel Dove the right to purchase back said land upon payment to him within one year of the amount he had paid for the same, with interest — $650 of which amount, being the amount Hayden had borrowed of Butler, to be paid at once, or within a short time; and that in pursuance of this verbal agreement Bethuel Dove, on the 26th day of July of the

same year, (1864,) paid $200, and for which the receipt in question was given by Hayden.

4. That Bethuel Dove wholly failed to comply with the conditions of such verbal agreement in this, that he never at any time, paid Hayden anything in pursnance thereof, except said $200, which $200 he was more than reimbursed by the the use of the premises thereafter.

5. That for about eleven years the Doves stood quietly by *with full knowledge of all the facts*, and so far as shown by the testimony, *acquiesed in the sale to Hayden*, removing voluntarily from the place, without Hayden's knowledge, before the expiration of the year from the date of the verbal agreement by which Bethuel Dove was to have the right within a year to purchase the premises, (see Tran. p. 98) during all this time seeing Hayden expend his money in the improvement of the place without protest or claim on their part.

And further, it follows as results of the *collateral issues* raised *by the evidence*, and discussed at length by the court, and which in part tend to the above conclusions,

1. That Hayden did *not* write the mortgage upon which the foreclosure suit was brought, as found by the court below, but Reason R. Boothby *did* write it.

2. That there was no such inadequacy of price in the amount paid by Hayden at the sheriff's sale, as to affect in the least, the *bona fides*, and integrity of such sale, when considered in view of the facts, that this was a judicial sale, at public auction, made after *two* postponements for want of bidders; that land about that time in that locality was very low; that times were hard; that numerous sales of land equally good with better improvements, and at *private sale* for lower prices, were made in the same neighborhood the same year: that Hayden was not present at the sale, and

could not therefore in any manner have influenced its fairness, *and no other person was willing to pay more.*

And as a necessary conclusion of law it must follow:

1. That Hayden is *not*, for any of the reasons urged in the bill, or in the opinion of the court below, a trustee *ex maleficio*, or *otherwise* for either Rachel Dove or Richard Manning, and the decree *should have been* in the court below, and must be here, for the defendant.

JURISDICTION.

Finally having considered the case on its merits, we come to the question of jurisdiction of the court, which, but from the peculiar nature of this case, affecting as it does the *personal* and *professional integrity* of the defendant, would have been first discussed.

It is respectfully submitted that it appears clearly from the pleadings and testimony in this controversy, that the circuit court had no jurisdiction of the same; that the plaintiff's bill should have been dismissed by the court below for want of jurisdiction, and should be now dismissed here for the same reason.

Section 629 Revised Statutes (Judiciary Act of 1789) in prescribing the jurisdiction of the circuit courts, reads:

"The circuit courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature at common law, or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State where it ss brought and a citizen of another State: *Provided*, That no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

The act of March 3, 1875, Revised Statutes of 1874–1881, page 174, amended the judiciary act of 1789 in several respects. The first section provides as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, *except* in cases of promissory notes negotiable by the law merchant and bills of exchange."

While section five of this last cited act (March 3, 1875) and which bears specially on the question raised, provides as follows:

"That if in any suit commenced in the circuit court * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiff or defendant for the purpose of creating a case cognizable * * * under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just."

Under the law as it stood prior to the passage of the act of March 3, 1875, just quoted, it had been ruled by the Supreme Court of the United States in different cases, notably in that of Smith *et al.*, *vs.* Kernochen, 7 Howard, 216 that if an assignment, transfer or conveyance by a citizen of one State to a citizen of another State for the purpose of confering jurisdiction in a United States circuit court was only *fictitious*, and made in such a manner that the *real interest* did not pass, but remained in the grantor or assignor that in such a case jurisdiction would not be conferred as in the language of the court in the above cited case, "then the suit would in fact be betwcen two citizens of the same State over which the court would have no jnrisdiction." It was conceded however that although the purpose may have been

to confer jurisdiction on the Federal Court, still if the transfer was made for a valuable consideration and the interest of the assignor or grantor actually passed out of him and to the assignee or grantee that then jurisdiction would be conferred although the main purpose of such transfer was to confer jurisdiction. The Court in this case remarked.

"The true and only ground of objection in all these cases is, that the assignor or grantor as the case may be is the *real party* in the suit; and the plaintiff on the record but *nominal* and *colorable*, his name being used merely for the purpose of jurisdiction; the suit is then a controversy between the former and the defendunts, notwithstanding the conveyance, and if both parties are citizens of the same State jurisdiction of course cannot be upheld." (1 Peters, 625. 2 Dallos, 381. 4 Dallas, 330. 1 Wash. C. C. 70. 2 Sumner, 251.)

The court however held in this latter case that the question of jurisdiction on the ground of citizenship could only be raised by a plea in abatement, saying: "The objection came too late after the general issue, for when taken to the jurisdiction on the ground of citizenehip it must be taken by a plea in abatement, and cannot be raised in the trial on the merits."

Subseqnently, however, this court in the case of Barney *vs.* Baltimore City, 6 Wallace, 287, decided in 1867, the rule as to *manner* and *time* of raising this question of jurisdiction, was changed. In that case there was no plea in abatement, and the plaintiff's bill was dismissed in this Court because *evidence* on the final hearing disclosed the fact that certain conveyances made for the purpose of changing the citizenship of parties in order to confer jurisdiction on the United States Courts did not transfer the real interest of the grantors.

The Court in that case, opinion by Mr. Justice Miller, said:

"If the conveyence by the Ridgleys of the District" (of Columbia) "to S. C. Ridgley of Maryland, had *really* trans-

ferred the interest of the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. McDonald vs. Smalley, 1 Peters, 620, and several cases since have well established this rule. But in point of fact that conveyance did not transfer the real interest of the grantors. It was made without consideration, with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the Court; and it is now equally well settled that the Court will not, under such circumstances give effect *to what is a fraud upon the Court and is nothing more.*

These were the rulings of this Court on this subject under the judiciary act of 1789, and prior to the passage of the act of 1875.

This latter act however (the 5th section) no longer left any room for construction, and the first case in review here under it was that of Samuel P. Williams, plaintiff in error vs. The Township of Nottawa. Error to the circuit court of the United States for the Western District of Michigan, decided at the present term.

The Court in that case, opinion by the Chief Justice, after stating the facts and reciting the provisions of the acts of 1789 and 1875 bearing upon the question, said:

"Under the act of 1789 it was held in Smith vs. Kernochon, 7 Howard, 216, that the objection (to the jurisdiction of the Court on the ground of citizenship) was one which could only be taken by plea in abatement, but in Barney vs. Baltimore, 6 Wall. 280, there was no such plea, and the bill was dismissed in this Court without prejudice, *because it appeared in evidence* that certain conveyances by means of which the citizenship of the parties was changed so as to give the courts of the United States jurisdiction, did not transfer the real interest of the grantors."

The court then in passing to notice the fifth section of the act of 1875 says:

"But whatever may have been the practice in this particular under the act of 1789 there can be no doubt what it

should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful *to guard against the consequences of collusive transfers to make parties*, and made it the *duty* of the court, *on its own motion*, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the Court, in Barney *vs.* Baltimore *Supra, such transfers for such purposes are frauds upon the Court and nothing more.*"

The court furthermore in considering the opinion in the case of Williams *vs.* Township of Nottawa, said:

"Inasmuch, therefore, as it was the duty of the Circuit Court, on its own motion, as soon as the evidence was in, and the collusive character of the case shown, to have stopped all further proceedings and dismissed the suit; the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that Court, &c., &c."

The law therefore is settled by the decision just quoted. Whatever may have been the rulings under the act of 1789, the rule under the act of 1875 requires no plea in abatement, but the prompt action of the court *on its own motion* without waiting for the parties to raise the question—dismissing the case whenever it appears from the evidence to the satisfaction of the Court, "that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or that the parties to such suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable under the act of 1875."

The question arises therefore:

Does this suit really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit

Court, or were the parties to this suit improperly or conclusively made or joined either as plaintiff or defendants for the purpose of creating jurisdiction in the Circuit Court?

The answer to these questions, in view of the testimony, and of all the facts of the case, is obvious.

The suit does *not* really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, and for the reason, that the suit does not really and substantially involve a dispute between citizens of *different* States but between citizens of the *same* State. And moreover it is more than clear, it is *conclusive from the whole case taken together*, that the party plaintiff was *improperly and collusively* made for the purpose of confering jurisdiction on the Circuit Court.

What are the facts bearing upon this question? On the 28th day of September, 1874, Rachel Dove commenced a suit against Hayden in the State Circuit Court of the State of Oregon, for Polk county, for the recovery of the land in controversy; and upon the same facts upon which the claim is now made, (Transcript, page 123,) the defendant appeared, filed answer, (Transcript, 116) issue was joined, but before the case was tried the plaintiff, Rachel Dove, through her attorneys, Lawson, Hill, Durham & Thompson, and Thayer & Williams, without any apparent cause at that time, although subsequent events disclosed the purpose clearly, dismissed her case. (Transcript, page 94.) The precise date of this dismissal is not given, though it is evident it was in the spring or summer of 1875, as Mr. Daly, one of Hayden's attorneys in that case testifies (Transcript, page 94) as follows:

"Judge Upton thought that Mrs. Dove could not dismiss the case without a final hearing, and appealed to the Supreme Court from the order of dismissal. We then proceeded to have our transcript perfected for appeal for the December term, 1875, of Supreme Court."

This case was not decided finally in the Supreme Court until after the 1st of December, 1875, probably not until late

in the spring of 1876, the precise date does not appear; and what do we find next? *Presto change!* And on the 12th of May, 1876, the bill of complaint in this case is filed in the Circuit Court of the United States for the District of Oregon, with *Charles Manning*, a citizen of the State of California, as plaintiff, instead of *Rachel Dove*, of Oregon; and a most singular feature, moreover, in this transformation scene is the fact that, in the case in the *State court*, the complaint of Rachel Dove was signed by "G. W. Lawson and Thayer & Williams," as her attorneys; while to the bill of Charles Manning in this case, the names of these same attorneys are attached as solicitors for *Manning*. But not only so, it is found the bill in this suit is verified *not* by *Charles Manning*, the plaintiff, but by *Bethuel Dove*, who swears he is agent and attorney in fact for Charles Manning, complainant in this suit, "for the purpose of the prosecution thereof." (See verification to bill, Transcript, page 4.)

These circumstances, to say the least, are somewhat singular, if it be a fact that the deed from the Doves to Manning *really transferred*, or was *intended* by either the Doves or Manning to *really transfer* the *interest* of Rachel Dove to Manning, or was intended to be something more than "*colorable only*," intended to change the real ownership, and "not for the purpose of creating a case." (See Williams *vs.* The Township of Nottowa, Oct. T., 1881.)

A reference to the bill also discloses the fact that the alleged sale and transfer from the Doves to Manning took place *on the 7th day of April, A. D. 1875*, nearly a year before the case of Rachel Dove in the State court was decided on error to the Supreme Court of the State, and evidently *immediately* after the dismissal by Rachel Dove of her case in the Circuit Court of the State, at least very soon after, and *possibly* before. The bill in the suit at bar contains this averment:

"That said Rachel being very aged and feeble, and unable to prosecute her claim in the premises; afterwards, and on

the 7th day of April, 1875, for a valuable consideration, paid and secured therefor, granted, bargained, and conveyed all her interest in said cause, together with any and all claims to the rents and profits thereof, and all her rights and equities growing out of the same to your orator, and your orator is now the lawful owner and holder thereof." (Bill of complaint, Transcript, pp. 3 and 4.)

A copy of the deed from the Doves to Manning (Trans., p. 112) commences as follows:

"Know all men by these presents, That Bethuel Dove and Rachel Dove, his wife, in consideration of *five thousand dollars*, the receipt whereof is hereby acknowleged, do bargain, sell, and convey, &c., &c."

Unless, therefore, the recital as to the consideration in this deed is false, Rachel Dove sold this land, with the legal title standing in the name of Hayden, with a suit in the State court still pending and undecided, having at most a mere equitable interest, *for the sum of five thousand dollars.*

But it must also be borne in mind that *Manning* is, and was then, *the husband of the daughter of the Doves.*

Further, Rachel Dove in her testimony says:

"My daughter, Elizabeth, is the wife of Charles Manning, the plaintiff; *Manning never has paid me any money on this land, but he was going to; he never gave me his note;* I can't say when I saw Manning last; *I think eight years ago*; Manning wrote first about having the land conveyed to him; said he would take the matter off our hands; I have not the letter with me." (Tran. p. 60.)

Comment is unnecessary. This testimony was given January 4, 1878. The deed to Manning was executed April 7, 1875, less than three years before, and yet she had not seen Manning for *eight years*, or more than *five years* before the alleged sale of the premises to him. And although nearly three years had elapsed between the date of the sale and conveyance to Manning and the date of Rachel Dove's testi-

mony, yet at that late day she says, "*Manning has never paid me any money on this land.*"

Again, Elizabeth Manning in her testimony was asked:

Cross-Int. 16. State whether at the time the premises in controversy were conveyed by Bethuel and Rachel Dove to your husband, Charles Manning, he did not know of the dispute about the ownership of the land between the Doves and Hayden?

A. *My husband did know of it.*

Bethuel Dove does not in his testimony refer in any way to the sale to Manning, while Manning himself *never once appears on the scene, either as party, client or witness*, his name is used presumedly with his consent, he has, however, *never signed his name to a pleading or other paper in connection with the case. Bethuel Dove verifies the replication as well as the bill.* (Tran. p. 17.)

Could a more complete attempt at a fraud on the law and the courts be presented? This deed to Manning was made, moreover, subsequently to the passage of the judiciary act of March 3, 1875, (the deed is dated April 7, 1875), and in the full light of its 5th section, and could there be a more conclusive case of a party-plaintiff having been "*improperly*" and "*collusively*" made, "*for the purpose of creating a case.*" Or can there in this case be any question that this suit does not "*really*" or "*substantially*" involve a dispute or controversy properly within the jurisdiction of the circuit court? And is it not apparent that it *does* involve a dispute and controversy between persons who are citizens of the *same State?* And is it not manifest furthermore, that the court below, in *failing* on ~~his~~ its own motion, and especially in *refusing* on the plea and demand of the defendant to dismiss plaintiff's bill, and in holding jurisdiction of the suit, proceeded in plain disregard of the provisions of the 5th section of the act of March 3, 1875?

In the case of Williams vs. The Township of Nottawa, *Supra.*, Chief Justice Wait, after stating the collusive manner in which the transfer in that case had been made, says:

"It cannot for a moment be doubted that this was done for the purpose of creating a case for Kline and Connor cognizable in the courts of the United States.. That being so, it was the duty of the circuit court to dismiss the suit as to these bonds and proceed no further, for as to them the controversy was clearly between the citizens of the same State, Kline and Connor being the real plaintiffs."

The court proceeding further, said :

"In this connection we deem it proper to say that this provision of the act of 1875, is a salutary one and that it is the duty of the circuit courts to exercise their power under it in proper cases."

So here, in the light of the transactions surrounding this controversy, it was the *duty of the Circuit Court* to dismiss this suit.

Nor can it be claimed in this case that the defendant is in any manner estopped from taking advantage of this objection to the jurisdiction; if, indeed, he could by any act or omission upon his part be prevented from raising the question at any time, by motion or otherwise, before final decree in this court.

The question was in this case *raised by the defendant in his answer*: (Tran. p. 15.)

"Defendant denies that on the 7th day of April, 1875, or at any other time, said Rachel Dove for a valuable or any consideration whatever, granted, or bargained, or conveyed her interest in said land, or her rights or claims for rents and profits thereof to complainant, or that complainant is now in good faith the lawful owner thereof."

It could not be said therefore with truth, that the attention of the Court below was not called to this question. There was a *direct issue* made in reference to it *in the pleadings*. And the Judge of the Circuit Court discussed it ; at some length, if not with some warmth, and passed upon it in his opinion. Under the following heading in the opinion, "*the following facts are satisfactory established*," the conclusion is reached :

"That said Bethuel and Rachel are illiterate persons, not being able to read or write, and ever since the loss of the premises have been poor and without means to prosecute a suit for the same, while the defendant, by his position and influence in the county has made it difficult, if not impossible, for them to assert their rights in the local tribunals with effect. That in September 1874, said Rachel commenced a suit against the defendant in the Circuit Court of Polk County, to recover the premises, but the same was afterwards dismissed by her, and the premises, on April 7, 1875, as aforesaid, conveyed to the plaintiff her son-in-law, for a valuable consideration, with the expectation, and understanding that the plaintiff would bring a suit in this court, to recover the premises, and such plaintiff thereafter became, and now is the owner of whatever right and interest therein the Doves then had."

We refrain from commenting on this portion of the opinion of the court below, it speaks for itself, and while some of the conclusions, such as "*the defendant by his position and influence in the county has made it difficult, if not impossible for them to assert their rights in the local tribunals with effect*" may be without any perceivable support, from any evidence in the case; it is however conclusive of one thing. That is, that this question of jurisdiction was not only *raised in the court below*, but considered *at length by the court*, and, it is respectfully insisted, erroneously overruled.

In conclusion, without any waiver of the question of jurisdiction, the court is respectfully requested, in view of the effect which the decision of the court below, and the elaborate and peculiarly emphatic opinion in its support, have upon a heretofore universally respected citizen and member of the professsion, in fastening upon him so far as the same can be done by an inferior tribunal, a *crime*, which Professor Sharswood in his ethics has declared "ought, like parricide in the Athenian law, to be passed over in silence in a code of professional ethics," and inasmuch, furthermore, as the case is now here, though wrongfully, to examine and pass upon the merits before proceeding to the question of juris-

diction, to the end—that, if an injustice has been done the defendant, the cloud which has thus been cast upon his *personal and professional integrity* may be removed by the highest judicial tribunal in the land.

Respectfully submitted,

A. H. GARLAND, and
JOHN. H. MITCHELL,
Solicitors for Appellant.